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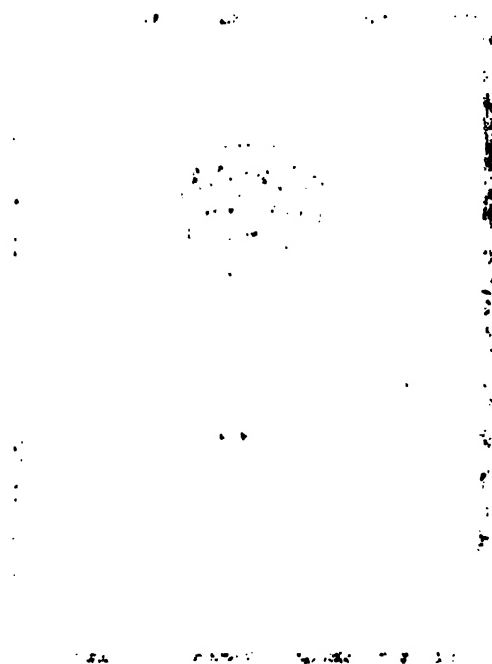
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vol 12

12

REPORTS OF CASES
ARGUED AND ADJUDGED IN
THE SUPREME COURT
OF THE
DISTRICT OF COLUMBIA,
SITTING IN GENERAL TERM,
FROM MAY 25, 1882, TO OCTOBER 29, 1883.

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13

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OF THE

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ERRATUM.

Page 55. Eighth line from bottom. For "latter" read *later*.

REPORTS OF CASES
DECIDED IN
THE SUPREME COURT
OF THE
DISTRICT OF COLUMBIA.

CLIFTON ANDERSON ET AL. *vs.* WILLIAM SMITH.

LAW. No. 20,636.

{ Decided May 25, 1882.

{ The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

When a motion that plaintiff give security for costs is improvidently granted, the plaintiff's remedy is to move to set it aside. If he does not do so the order remains in force, and when the case is called for trial, the plaintiff should on motion be nonsuited, unless a continuance be granted.

STATEMENT OF THE CASE.

Action of ejectment to recover a lot of ground in the county of Washington.

The declaration was filed April 12, 1879. On the 9th of April, 1880, the defendant filed a motion "for a rule on the plaintiffs to give security for all costs and charges that the said defendants may be put to in case the said plaintiffs shall be nonsuited or judgment be given against them, they being non-residents of said District."

It did not appear by the record that any notice of the motion was served upon the plaintiffs.

April 17, 1880, the court passed the following order :

"Upon argument and consideration of the defendant's motion, filed 9th of April, 1880, that the plaintiffs, being non-residents of the District of Columbia, give security for costs, it is ordered accordingly "

December 21, 1880, the order for security not having been complied with, the defendant filed a motion "to enter a judgment of nonsuit, because the plaintiffs have not complied with the rule to give security for costs, laid on them on the 17th day of April, 1880."

On the same day the case was called for trial, and the above motion being pressed, the court refused to grant the same but proceeded to trial, whereupon the cause being submitted to the jury upon the evidence a verdict was rendered for the plaintiffs. Defendant then moved for a new trial upon his exception to the ruling of the court in overruling the motion to enter a judgment of nonsuit because the plaintiffs had not complied with the rule to give security for costs.

J. B. DARNIELLE and J. McDOWELL CARRINGTON for plaintiffs:

The record shows that the application for the rule upon the plaintiffs to give security for costs was made *ex parte* without notice to plaintiff's counsel. It further shows that no rule was ever issued or served on the plaintiffs, or their counsel, that no proof of the non-residence of the plaintiffs was ever presented to the court, and that the order of April 17, 1880, upon which defendant relies, was made improvidently, no foundation having been laid for its passage either under the rules of court or the act of assembly. Thompson's Digest, 175. The order was therefore a nullity, and was so regarded by the court, when the matter was brought to its attention at the trial.

REGINALD FENDALL and J. D. COUGHLAN for defendant :

The defendant's motion for nonsuit should have been granted.

The motion for security for costs was made, the order requiring security was passed, a term of court had intervened, no security had been given as required, and the order now is and was in force when the motion for nonsuit was made, as authorized by the Maryland act of 1796, chap. 48. Thompson's Digest, 176.

Even though the order for security was passed at the trial term, and just preceding the nonsuit, the defendant would be entitled to judgment, as no continuance had been moved or asked for by plaintiffs, as required by said act.

Mr. Chief-Justice CARTER delivered the opinion of the court.

If this motion for security for costs had been granted improvidently, the remedy of the plaintiff was to have moved the court to set it aside. Not having done so, the order remained in force, and the defendant was under no obligation to be ready for trial. He had a right to expect that the court would not require him to make any further defense until the order of the court requiring security was complied with by the plaintiffs. The motion for nonsuit should therefore have been granted or the cause continued. Judgment reversed and cause remanded.

BALTIMORE UNITED OIL COMPANY

vs.

BARBER AND LANGDON.

LAW. No. 21,338.

{ Decided June 5, 1882.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. A set-off must be a substantial demand by a real party interested in the payment of that which is the subject of the action; whether the party appears upon the record or not is immaterial, if it be shown that he is the real party interested; and the court will go outside of the record to find the real party.
 2. The same rule applies in cases of recoupment; thus, in an action by A against B and C, the defendants sought to recoup the plaintiff's demand, it was shown that D, who was not a party to the record, was a partner of B and C in the original contract, and was interested in the reduction of the plaintiff's demand, and that he had suffered in common with B and C the damage sought to be recouped.
- Held*, That the recoupment was admissible.

THE CASE is stated in the opinion.

WM. JOHN MILLER for plaintiff.

WORTHINGTON & HEALD for defendants.

Mr. Justice COX delivered the opinion of the court.

This is an action of assumpsit for goods and merchandise sold by the plaintiff to the defendants. It seems that the defendants were engaged in laying pavements in the streets of Washington under contract with the District of Columbia, and that they bought from the plaintiff the material (the residuum of petroleum oil) which they used to mix with asphalt and sand in order to make the material of which the pavements were composed. The complainants claim for material furnished \$1,493 with interest.

The defence is recoupment. It is claimed, on the part of the defendants, that the terms of the contract required that the residuum should be free from coke and water and other impurities; whereas the material delivered contained, on the contrary, these very impurities, and, as a consequence, when they undertook to make that use of it for which it had been purchased, the oil exploded and set fire to and consumed a large amount of property and machinery, amounting, in value, to twice the demand of the plaintiff. The defend-

ants, therefore, seek a recoupment of the demand with this amount of damages.

To this the plaintiff answers, that the article furnished was free from the impurities alleged. Second, they charge the casualty complained of to the negligence of the defendants in the use of the article. Third (and this presents the most important question of law), they say that the property injured by this explosion was not the property of these defendants, but was owned by them jointly with John S. Baldwin, and that he was in fact in partnership with them. And they say that recoupment is governed by the same general principles as set-off, and they invoke the rule requiring mutuality in such cases. They say, inasmuch as the defendants could not set-off against the plaintiff the independent demand of Baldwin, for the same reason they could not recoup against the plaintiff damages suffered by Baldwin and themselves instead of by themselves alone.

The court below took this latter view and instructed the jury that if they believed, from the evidence, that Baldwin had any interest in the property destroyed by the fire, then the defendants cannot recoup the damages to that property in this action.

Now, the general rule in regard to set-off is, that the set-off must be mutual; that is to say, the amount which the defendants claim as a set-off must be a substantial demand by the real parties interested in the payment of that which is the subject of the action. For instance, if A brings suit against B, B cannot set off against A a demand that *he* and *C* have against A. But it often happens that the nominal parties to the record are not the real parties, even under the rule of set-off; and the court looks behind the record to see who are the real parties interested. For example, if an agent should sell me goods, and should afterwards sue me for the price, I can set off against his demand the claim I have against his principal, except so far as it might interfere with the agent's personal interest. With that exception I could set off my claim against his principal, although he was not in the record.

Thus we see that courts go outside of the record to find the real parties in interest. And if that is true in the law of set-off, it may be asserted with still more reason in regard to recoupment. Set-off is usually a distinct and separate demand, whereas recoupment goes to the very essence of the plaintiff's own demand. It seeks a reduction of the plaintiff's demand because his performance has fallen short of what was stipulated, or it has been so faulty as to produce some injury to the other party. It would seem that the real party interested in the contract, whether in the record or not, is interested in reducing the demand, and any damage that he suffers ought to be allowed to be shown, as he is the real party interested.

If, for example, I had sold goods to an agent under such circumstances as would make him personally responsible, and I should sue him, it would be strange if he would not be allowed to show that he purchased the goods for a third person, his principal, and that the goods had been of no value to that principal, and my breach of the contract had been a serious injury to him.

Applying this doctrine to the present case, the evidence we think, tends to show, and it was the contention of the plaintiff, that Baldwin was a partner with the defendant. It was shown that the contract was taken in the name of Baldwin, and these defendants were his sureties. They were to manage the business, and they were interested to the extent of one-half or two-thirds in the gross profits. Now, that made them, in contemplation of law, partners. This contract was made by Barber & Langdon, as agents for all three. And they might all have been sued in this action by the plaintiff. So, too, Baldwin might have united in this suit against the plaintiffs for their alleged breach of this contract. Baldwin and Barber & Langdon were, therefore, the parties really interested in this contract, and they are the same parties interested in this recoupment, just as much so as if they were all parties to the record. We think, therefore, upon the general principles we have adverted to, that the recoupment should have been allowed, and that the court

below was in error in giving the instruction excepted to. This makes it unnecessary to pass upon any of the other questions involved in the case.

The judgment is reversed and the cause remanded for a new trial.

JOHN BURNS

vs.

THE METROPOLITAN BUILDING ASSOCIATION.

EQUITY. No. 7445.

{ Decided June 5, 1882.

{ The CHIEF JUSTICE and Associate Justices COX and JAMES sitting.

1. Where, by the constitution of a building association, it is provided that "the association shall continue until the unsold stock is worth fifty per cent. premium and shall then proceed to close," if the value of the association's real estate and other assets aggregate the fifty per cent. of profit contemplated by this clause of the constitution, then the association cannot make the stockholders keep on paying dues while it holds its real estate for some further advance, but it must close up.
2. Where the real estate held by the association consists of property bought in by it at public auction in competition with other bidders, the price bid by the association must be taken, as against it, as conclusive of the value of the property for the purpose of ascertaining if the time has arrived when the association should close; but the value, if greater, may be shown by witnesses, for the association cannot, with an all-sufficient amount of property in its hands to enable it to close up, go on collecting dues.

STATEMENT OF THE CASE.

Complainant, a member of the defendant association, obtained from it several loans or advances of money on his shares of stock, giving a deed of trust to secure the payment by him of two dollars a month on each share until the close of the association, or, in the alternative, the return of the money advanced. Complainant paid regularly all that was required of him until about the 30th of March, 1880, when he ceased his payments. The association then, after the lapse of several months, threatened to foreclose the deed of trust, claiming that, according to its mode of settlement, a balance of \$980 was due it. Whereupon complainant filed this bill, alleging that under the provisions of article 17 of

the constitution of the association the time had arrived for it to close, and that on the settlement of accounts between him and the association nothing would be found due from him. The 17th article of the constitution was as follows:

"ART. XVII. The association shall continue until the unsold stock is worth fifty per cent. premium, and shall then proceed to close, and each stockholder shall receive a *pro rata* share of profits as above on all shares upon which no advance has been made."

The bill concluded with a prayer for an injunction against a foreclosure of the deed of trust and for an account.

On the coming in of the answer a temporary injunction was granted and the cause referred to the auditor for a statement of an account between complainant and the association.

Exceptions to the report were filed by both parties, one of the complainant's being that the auditor had erred in not establishing from the evidence before him the time when the association should have closed its existence as an association. The exception was overruled by the court below.

R. B. LEWIS and T. JESUP MILLER for complainant :

We contend, that on any theory of construction of the constitution, it is unconscionable and unjust to keep stockholders who have borrowed money on their shares paying in two dollars a month per share after the time when the association should have closed, simply to await the sale of real estate or the collection of notes outstanding. This requirement on the part of the association would be simply to demand that one set of stockholders should take money out of their pockets and put it into the pockets of the others. The officers and managers of the association are principally those who would profit by the transaction, and the longer the real estate remained unsold the larger the profits and percentage the "*unadvanced*" stockholders would receive.

WILLIAM H. BROWNE for defendants :

The auditor could not fix the time for closing the association.

This is manifest from the evidence, which is all one way.

"Q. 166. Then I understand that this association is to be kept alive until the assets are disposed of and turned into cash?"

"A. There is no other way."

"Q. 187. Has it not been for a long time endeavoring to turn that [bought in] real estate into cash?"

"A. It has and is."

See also answers 184 and 189, the latter showing that, but for the delinquencies of members who obtained advances, it might have closed long ago.

Mr. Justice JAMES delivered the opinion of the court.

The complainant, Burns, as a stockholder of the Metropolitan Building Association, obtained loans from it on 25 shares of stock held by him. The loans made by the association are carefully described in its charter as an advance of the proceeds of the stockholder's stock in anticipation of what he would have had at the final distribution if he had not borrowed from the association.

It appears that the terms of such an arrangement are that the stockholder shall go on paying the dues upon his stock just as a non-borrowing stockholder, and in addition thereto one dollar a month on each share, and that he shall make these payments until either of two events, in the alternative, may come to pass, viz., until the expiration of the term of the association by reason of its being able to divide fifty per cent. or a certain amount on its stock, or, in case he shall discontinue or default, then he shall be charged with the amount advanced him, which amount is to be treated as a debt, upon which he shall be credited with one-half of the money that he has paid in, and the profits which may have accrued upon the use of that money.

Our conclusion, which is not final, relates to the first proposition. If the time has arrived, it is one of the rights of the advancee to have the association close up. It might happen, for example, that after the expiration of five years the assets of the company, whether they choose to sell them or not, amount to just fifty per cent. of the stock. In that

case we are clearly of the opinion that a man is not to be compelled to go on making payments into the treasury, especially as he has no interest in these assets. They are not to be distributed to him, because under this management he takes his advances once for all. The final distribution is among the non-borrowers. The complainant alleges in his bill that the time for closing up the association had arrived when he made his last payment. The reply is, "We have not closed up because we cannot sell our real estate to a proper advantage." But we are of opinion that it is not for the association to hold real estate with a view to some advantageous advance, and continue to keep the stockholder paying his dues. If its real estate and all its assets aggregate in value the fifty per cent. of profit contemplated by the constitution when the association should close up, then the time has arrived when the stockholders should no longer be compelled to continue the payment of dues. But how is this to be ascertained?

The real estate owned by the association consists altogether, as we are informed, of property bought in at foreclosure sales. It was bought, of course, at public auction, and the price bid at such a sale is one of the best ways of ascertaining the value as against the purchaser. When a purchaser bids in competition with others a certain amount of money at public auction, *as to him* the value is ascertained, and it may be, for aught that we know, that valuing the property at the price bid for it by the present holder—the association, that and its other assets will amount to what this complainant alleges. If that be the case then the time has arrived when the association should close up and cease compelling this complainant to contribute further payments.

We think, therefore, that this case should be referred to the auditor, with directions to ascertain in the first place what that amount of money is, in order that the complainant may show, if he can, that the time has come when he is no longer under any obligation to pay anything further.

The conclusion of the court is, that the case be referred to the auditor with directions to ascertain the value of the

property in the way indicated, that is to say, to ascertain the value of the property by the price at which it was bought in, and then to ascertain the value, if greater, by witnesses ; the reason being that it is not for them, with an all-sufficient amount of property to enable it to close up in their hands to go on collecting these dues. Still we are to regard the bids made by the association as conclusive evidence against it as to the value of this property for the purpose of closing up. If it has bid in a piece of property for a thousand dollars it is to be taken as worth a thousand dollars as against the bidder. The association cannot turn to the complainant and say, " although we have paid a thousand dollars for this property we are not going to let you have the benefit of that price as one of the elements of letting you get out ; you will have to keep on paying." When they made an offer at a public auction for the property and bought it at that price they ascertained its value as against themselves in their dealings with this complainant.

We do not, at this stage of the case go into the question of usury raised on the argument of the case, but direct the case to be referred as indicated.

UNITED STATES, EX REL. HORACE KOECHLIN AND OTTO N. WITT,

vs.

EDGAR M. MARBLE, COMMISSIONER OF PATENTS.

LAW. No. 23,740.

{ Decided June 5, 1882.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. Whether, in an application for a mandamus to compel the issuance of letters-patent for an invention, the Secretary of the Interior, and not the Commissioner of Patents, should be made the party respondent, *quære*.
2. Congress, in creating the Patent Office, has by express legislation given that office the power to enact rules for its conduct; those rules, if within the powers of the Office and reasonable, are just as authoritative as the laws of Congress itself.
3. There is nothing unreasonable in the requirements of Rule 39 of the Patent Office, and, where it has not been complied with, this court will not issue a mandamus to compel the issue of a patent, although the invention be new and useful.
4. An inventor receiving a patent in the first instance in this country is entitled to seventeen years' protection of his invention, but if he has previously obtained letters-patent in one or more foreign countries, then, while not deprived of his right to a patent here, the term to which the law in such case limits his protection is a period not extending beyond the date of the expiration of that one of the foreign patents first expiring.
5. In the construction of statutes in *pari materia*, they are all to be kept alike in view, and construed in the light of each other, and their effect considered under such construction.

STATEMENT OF THE CASE.

This was an application for mandamus against the Commissioner of Patents commanding him to issue letters-patent to the relators for their invention, and ordered to be heard in the General Term in the first instance.

The petition sets forth that the relators, Horace Koehlin, a citizen of France, and Otto N. Witt, a citizen of Switzerland, residents respectively of Loerrach and Mulhouse, in the empire of Germany, did, on the 22d day of March, 1882, make application for letters-patent of the United States for certain improvements in the production of blue and violet coloring matters. That their said application was examined by the said Commissioner of Patents and their said invention found to be new and useful and entitled to protection by the grant of letters-patent; whereupon an official circular of allowance was issued by the said Commis-

sioner on the 28th day of April, 1882, and the final fee required by law was paid by relators on the 4th day of May, 1882, and that thereupon it became the duty of the said Commissioner to issue to relators letters-patent of the United States for their said invention. Yet the said Commissioner has refused and still refuses to issue said letters for said invention to the great and irreparable injury of relators, who have no other remedy except that herein prayed for. The petition concludes with a prayer for an alternative writ of mandamus against the Commissioner, commanding him to issue letters-patent to relators for their said invention or to show cause for his refusal so to do.

A rule to show cause having issued, the respondent, in his return, admitted the filing of the application for letters-patent and the allowance by the examiner, also the notice to the applicants of said allowance and the payment by them of the final fee of twenty dollars, but set forth that on an examination of the papers it was found that the applicants in the oath filed with their application had stated that their invention had been patented, before the filing of said application in France, by a patent dated March 19, 1881; in England, March 28, 1881; in Belgium, April 4, 1881; and in Sweden, July 30, 1881; and it was also recited in said oath that a patent had been applied for in Austria, but that none had been yet issued. Whereupon applicants were called upon, under Rule 39 of the Rules of Practice of the Office, to state whether or not a patent had issued to them in Austria, and to give the date and number of the same. This request was based on the requirement of Section 4887 of the Revised Statutes of the United States, which provides that every patent granted where the invention has been first patented in a foreign country, shall be so limited as to expire when the foreign patent expires, and if more than one such patent has been issued, then with the one having the shortest term to run. It appearing in the affidavit that a patent had been applied for in Austria at some time not named, it was deemed proper that applicants should state whether such patent had issued, and, if so, to give its date and number.

Patents may issue in Austria for fifteen years, or any lesser period, and if a patent had already issued, then the patent issued by this office should be limited so as to expire at least when the Austrian patent would expire. Such oath not having been filed by the applicants, the patent was withdrawn from issue. The only reason, therefore, why the patent was not issued is because applicants have not complied with what is deemed to be a proper requirement in the Office, and in accordance with the decision of the Secretary of the Interior, dated April 10, 1882. 21 Official Gazette, page 1197.

In conclusion it was submitted that the writ of mandamus should be denied for the following reasons:

First. Because the requirement of the Office in this case was reasonable and just in the proper administration of the Office under the section of the statute above referred to.

Second. Because applicants were not remediless without the aid of the writ of mandamus, for if the patent was improperly withheld it is within the directory powers of the Secretary of the Interior, under Section 481 of the Revised Statutes, to have given him the relief sought in this court.

Third. Because the issue of the patent has not been refused applicants, but they have simply been required to fill an oath which shall determine the length of life of the patent when issued.

A. POLLOK for relators.

Mr. Chief Justice CARTER delivered the opinion of the court.

Preliminary to the decision in this case, we make the suggestion that this application for mandamus is not made against the right party. My recollection is that the Secretary of the Interior is the officer of the Government who issues letters-patent, and that we had occasion some time ago to dismiss an application for a mandamus for the reason that the relator had misconceived the party to be proceeded against, and if no other reason existed for a dismissal of the petition in this case, want of the proper parties might be sufficient. That question, however, was not presented, nor

has it been particularly considered by us. Our conclusion is predicated upon the substance of the petition, and our enquiry has been whether we could grant the relief even if the proper party was before us; and that inquiry has brought us to a consideration of the force and effect of a rule of the Patent Office. Congress, in creating the Patent Office, has by express legislation given that office the power to enact rules for its conduct. Those rules, if they are within the powers of the Office, are just as authoritative as the laws of Congress itself, if within the limitations of its powers. If, therefore, Rule 39 of the Patent Office is a reasonable one, the Commissioner of Patents has only exercised a power vested in him by law.

The language of Rule 39 is as follows:

“In every original application the applicant must distinctly state, under oath, whether the invention has been patented to himself or to others with his consent or knowledge in any country, and if it has been, the country or countries in which it has been so patented, giving the date and number of each patent, and that it has not been patented in any other country or countries than those mentioned, and that, according to his knowledge and belief, the same has not been in public use in the United States for more than two years prior to the application in this country.”

We see nothing unreasonable about this rule. On the contrary, we think it a very reasonable one. The applicant is merely required to make oath in reference to a matter of which he of all persons ought to be best informed.

Section 4887 of the Revised Statutes of the United States, regulating the issuing of patents, provides:

“No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid by reason of its having been first patented or caused to be patented in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application. But every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same

time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years."

All that the Commissioner of Patents has required of these applicants is, that in view of the provisions of this law they shall state under oath what patents they have obtained in foreign countries. This the applicants have refused to do, and the reason disclosed in their argument here is that one of these patents has but three years more to run in that country. Now the natural life of a patent originally obtained in the United States is seventeen years, but if the applicant's invention has been previously patented in Europe, then a patent can only issue in the United States for a period limited to expire with that one of the foreign patents which shall first expire. The reason given by the applicants for their non-compliance with the rule is, that the only power of the Commissioner is to issue a seventeen years' patent, and they argue that the clause of the statute providing for a seventeen years' term for the first inventor of any new and useful article, being inconsistent with the provisions in regard to patents obtained in foreign countries, consequently overrules it.

As the provision, however, in regard to letters-patent issuing for a term of seventeen years applies only to patents first obtained in this country, the point made by the applicants is without force.

It is a well-known rule in the construction of statutes *in pari materia* that they are all to be kept alike in view, and construed in the light of each other, and their effect to be considered under such construction. Applying this rule in the reading of these statutes, we find the law declaring that an inventor taking out a patent in the first instance in this country, is entitled to a seventeen years' protection, but if he has previously obtained letters-patent in one or more foreign countries, then while not deprived of his right to a patent here, the term to which the law in such case limits his protection, is a period not extending beyond the date or the expiration of that one of the foreign patents first expir-

ing. That is the law; whether it be wise or unwise is something with which we have nothing to do. It is a matter of legislative discretion, and not a question for this court. All that concerns us is the compatibility of the statutes, and we think they are perfectly so. The law makers were legislating in regard to different conditions of the same subject, and they have made the law clear and express, and neither we nor the Commissioner of Patents can disregard it.

Even, therefore, were the proper parties before us, with the case as made out, we should discharge this rule, and it is so ordered.

JAMES P. RYON ET AL. vs. JOHN T. MCGEE ET AL.

IN EQUITY. No. 8049.

{ Decided October 8, 1882.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

A general authority to a real estate agent to sell real property, is only an authority to find a purchaser but not to conclude and execute a contract binding upon his principal.

STATEMENT OF THE CASE.

Complainants filed their bill in equity reciting that the defendant McGee, being the owner of lot 4 in square 99, in the city of Washington, D. C., agreed in writing (Exhibit A) to sell the same to complainants for \$2,000, and that defendant had received complainant's check for \$100 on account of said sale. That complainants have performed all the requirements of the contract on their part to be performed, but that the said defendant refuses to comply with his part of said agreement. The bill concluded with a prayer that defendant be decreed to convey to complainants an unincumbered title to the real estate mentioned in the agreement, and for general relief.

" *Exhibit "A" Annexed to Bill.*

" WASHINGTON, D. C., Feb. 18, 1882.

" Received of Ryon & Tracy, check for one hundred dollars, being part of purchase money for part of lot 4 in square 99,

being 42 feet front on 21st street, by the depth of 89 feet on M street, N. W., this day sold to the said Ryon & Tracy for the full sum of two thousand dollars, out of which amount the amount of taxes now due are to be deducted, and the balance to be paid in cash. Said property is sold, title perfect and clear of encumbrance and taxes as above-named. Terms of sale to be complied with in thirty days, otherwise the aforesaid sum of one hundred dollars to be forfeited, and in case the title is not good the aforesaid amount is to be returned to the said Ryon & Tracy.

"JOHN T. MCGEE,
"His only Son and Heir of Patrick McGee, Jr."

By leave of the court, the complainants filed an amended and supplemental bill making Charles S. Drury a party defendant and reciting :

That after the original bill in the cause had been filed, said Magee, on the 23d February, 1882, acknowledged a deed of conveyance of said lot to Charles S. Drury, nominal consideration \$2,000, recorded 23d February, 1882.

That said deed is in violation of the rights of complainant; that said Drury had full knowledge of the contract, Exhibit "A;" that there was no consideration for said deed; that both Magee and Charles S. Drury are insolvent, and a judgment at law against them of no avail; asks specific answers to certain interrogatories; prays for general relief, and that said Drury may be decreed to be trustee of said real estate for the benefit of complainants.

Drury pleaded a disclaimer of any interest in the real estate in question.

The defendant, Magee, answering the original bill, averred that complainant's check had no internal revenue stamp thereon; that before signing the contract, Exhibit "A," defendant's agent, Wm. S. Jackson, had made sale of said lot to Charles S. Drury, by his agent, Thomas E. Waggaman, and defendant hereby ratifies his agent's action.

Answering the amended bill, he adopts the defence made in the answer to the original bill; denied that Drury was his trustee, and asserts that \$150 was paid by Drury, as part

of the purchase money, the residue deposited to abide the result of the suit. A general replication was filed and testimony taken. On hearing in Special Term the court dismissed the bill. The other facts necessary to an understanding of the case are stated in the opinion of the court.

W. WHEELER and BIRNEY & BIRNEY for complainant :

To give the contract made by Jackson with Waggaman preference over the contract made by McGee with complainants, it must appear that it was *first in point of time*, and also that it was then binding upon McGee, and *capable of being enforced against him*.

It is not clear from the evidence which transaction was first. Ryon & Tracy gave McGee a check for \$100 to bind the purchase, between nine and ten o'clock a. m., and Jackson received Waggaman's money between the same hours. But we submit as propositions of law:

First. That Jackson was without authority to bind McGee by a contract of sale.

Second. That by the paper writing which he delivered to Waggaman, McGee was not bound; and

Third. That when Jackson reported his action to McGee, he was powerless to ratify his agent's act, having already made a binding sale to complainant.

A verbal authority to an agent to sell real estate is not sufficient to authorize the agent to execute a contract of sale in the name of his principal, or to sign the name of the latter to such contract. *Duffy vs. Hobson*, 40 Cal., 240; *Treat vs. DeCelis*, 41 Cal., 202; *Vanhorne vs. Frick*, 6 S. & R., 90.

The contract bound Jackson and not McGee, for in order to bind a principal, in a contract required to be in writing, and to make it his own, the instrument must purport, *on its face*, to be his contract; if it purports to be the contract of the agent, parol evidence is inadmissible to show that it was intended to bind the principal. *Prather vs. Ross*, 17 Ind., 495; *Evans vs. Wells*, 22 Wend., 324-335; *Townsend vs. Hubbard*, 4 Hill, 351-357; *Stone vs. Wood*, 7 Cowan, 453; *Stackpole vs. Arnold*, 11 Mass., 26-29; *Story on Agency*, 148, 146, 154.

The contract with complainants was certain, and filled all the requirements of the law. Such contracts are decreed to be fulfilled as a matter of course. 1 Story Eq. Juris., sec. 746; *Brewer vs. Hubert*, 30 Md., 301, 312; *Smoot vs. Rea et al.*, 19 Md., 405.

Defendant, McGee, should be decreed to carry out his contract with complainants and defendant Drury, and those claiming under him, be decreed to hold the land as trustees for complainants.

JOHN C. WILSON and R. P. JACKSON for defendant.

Mr. Justice Cox delivered the opinion of the court.

John F. McGee gave a general authority to W. S. Jackson, an attorney, to sell his property, being part of lot 4 in square 99, in Washington, D. C. On Friday evening, February 17th, G. W. Stickney informed McGee that he had sold his property for him and arranged for a meeting between McGee and the proposed purchaser the next morning. On Saturday morning, between the hours of nine and ten o'clock, McGee met with James P. Ryon, complainant, and the result was a sale by McGee to Ryon, a memorandum of which, in writing, was sent by McGee about the middle of the same day. Meanwhile, Jackson had undertaken to sell the same property, between the same hours of nine and ten o'clock, to Charles S. Drury, and executed the following paper :

"Received of Thos. E. Waggaman, for Chas. S. Drury, the sum of fifty dollars, being deposit on part of lot 4 in square 99, sold free of all encumbrance to date for \$2,000 cash, being the corner part of lot 4, front 42 feet on 21st by 89 on M street; title to be perfect or deposit refunded; 10 days allowed to close sale.

"W. S. JACKSON.

"February 18th, 1882."

Neither McGee nor Jackson knew what the other had done until late that evening, when Jackson informed McGee of his proceedings. It is claimed on behalf of Drury that McGee then ratified the act of Jackson. Ryon claims, on

the contrary, that his verbal agreement with McGee was prior in time to Jackson's arrangement with Drury. If the latter be true, then even supposing that Jackson's contract would be operative under other circumstances, McGee's verbal arrangement followed up by a written memorandum on the same day, would entitle Ryon to the preference. It is, however, very difficult to determine by the testimony which transaction was prior in point of time, but it is made unnecessary to determine it by other considerations.

We think that a general authority to an agent to sell real estate is simply an authority to find a purchaser, and is not an authority to conclude and execute a contract of sale which shall bind the principal. We adopt the views on this subject of the Supreme Court of California in the case of *Duffy vs. Hobson*, 40 Cal., 240. It appeared there that the owner of the real estate, Hobson, had told Atkins, his agent, to sell his lots for \$2,000. The agent, Atkins, sold the premises to Duffy at that price, and executed and delivered in the name of Hobson a contract in writing agreeing to convey the lots to him. The principal repudiated the agent's act, and the purchaser, Duffy, brought an action for damages for his refusal to convey the title. The court say:

"We are of opinion that the authority given to Atkins to sell the property was not sufficient to authorize him to execute a contract of sale, in the name of Hobson, or to sign the name of the latter to any contract of sale. We think that it was no more than a mere authority from Hobson to find him a purchaser at the price of \$2,000.

"This is the settled construction put upon the employment of professional brokers 'to sell' or to 'close a bargain' concerning real estate, and we know of no reason why the same language employed to express the authority of any other agent 'to sell' should have a more extended meaning. Besides, a sale of real estate involves the adjustment of many matters in addition to fixing the price at which the property is to be sold. The deed of conveyance may be one with full covenants of seisen and warranty, or only those covenants imported by the use of the words 'grant, bargain and sell,'

under our statute, or it may be by quit-claim merely. The vendor may be unwilling to deal with a particular proposed purchaser on any terms. He may consider him pecuniarily unable to comply with the contract, even if the title proves satisfactory, and he may decline to bind himself to convey to such purchaser at the end of the time necessary to examine the title, because he might thereby in the meantime lose an opportunity to sell to some other person who might desire to purchase, and in whose good faith and ability to pay he reposed entire confidence. All these and many other like considerations might, and usually do, arise in the mind of the vendor.

"Now, a mere authority 'to sell' can hardly confer power upon the agent to determine all these matters for the principle, so as to bind him by his determination, and yet, unless the agent do have such power, he cannot make a definite contract or one that could be said to have the certainty requisite to deprive the principal of his option to ultimately decline to make the sale. To give to the mere words 'to sell' such a broad signification as that would be to invest the agent with powers of that ample and discretionary character usually only conferred with caution and by means of a general letter of attorney, where the terms are distinctly expressed.

"While it is true that a power to sign the name of a principal to a contract of sale may be given verbally, we think that the words used for the purpose should be distinct and clear in their meaning and import, and should, with the requisite degree of certainty, manifest the intention of the principal to do something more than merely to employ a broker."

In addition to this, we have decided a similar question before in an action brought by a real estate agent to recover his commission, where he had found a purchaser, but the principal had there declined to execute the contract. We held that the agent had performed his contract and was entitled to his compensation by finding a suitable purchaser. If this is the extent of his obligation it is also the limit of his powers.

The consequence is, that Jackson's act in executing the contract, whether in his own name or in the name of McGee, would be simply a nullity. Any ratification afterwards, and after McGee had executed his written agreement, would avail nothing, because it could not interfere with the intervening rights created by McGee's written contract. We, therefore, are of opinion that the decree below must be reversed, and the cause remanded for further proceedings.

SAMUEL A. PEUGH vs. HENRY S. DAVIS.
EQUITY. No. 1713.

{ Decided October 21, 1882.
} The CHIEF JUSTICE and Justices MAC ARTHUR and JAMES sitting.

In an account between mortgagor and mortgagee, where the latter has been in possession and is chargeable with a reasonable sum for use and occupation, that charge is to be determined, not by the value of the premises, but by the value of the use under all the circumstances. Therefore, where the use is valueless, no charge will be made against the mortgagee.

So held, in this case, where the Supreme Court of the United States directed a charge against the defendant of a reasonable sum for use and occupation by him of the premises in controversy, and this court finds the use of no value.

STATEMENT OF THE CASE.

The parties to this cause were declared by the Supreme Court of the United States mortgagor and mortgagee respectively (96 U. S., 332); and that court in fixing the defendant's liability as mortgagee in possession said: "The defendant should be charged with a reasonable sum for the use and occupation of the premises from the time he took possession in 1865, and allowed for the taxes paid and other necessary expenses incurred by him."

By the opinion and decree of the Supreme Court the cause was remanded to this court, from which it had been appealed (see 2 Mac Arthur, 14), for a statement of the account between the parties accordingly. A reference was thereupon made to Thomas Hood, then auditor, who, on February 21st, 1880, reported to the court a charge against

the defendant for use and occupation at six per centum per annum on the assessed valuation of the premises by the District authorities for taxation.

To that report exceptions were taken by both parties, and, on November 5th, 1880, the court (Cox, J.), set the report aside and referred the cause to Jas. G. Payne, auditor, for a restatement of the account. In ordering this reference the court said: "The testimony taken in the cause shows that the premises were of no value to the defendant in respect of use and occupation, in the usual import of those terms: but it appearing to the court that under the circumstances of the present case, use and occupation may be held to include some reasonable compensation to the complainant for loss by reason of such use and occupation, whereby he was prevented from developing and disposing of the property, the auditor is directed that the defendant be charged, as representing such compensation, the annual general taxes, and also one or two per cent. per annum on the market value of the property, to be fixed by the auditor."

Obediently to this direction the auditor stated an account fixing the market value of the premises, and charging the defendant one per cent. thereon as for use and occupation.

To this report, also, exceptions were taken by both parties; and, on October 6th, 1881, the court (Wylie, J.) sustained the auditor in all particulars except as to the market value, which was reduced from the auditor's estimate to the assessed valuation.

The cause came up to the General Term on cross appeals; in disposing of which the court confined itself to but one of the controverted items, viz., the amount to be charged the defendant on account of use and occupation. The statement of the arguments of counsel is accordingly confined to that particular.

MERRICK & MORRIS and J. J. JOHNSON for the complainant:

The direction of Cox, J., is a nullification of the opinion

and mandate of the Supreme Court. The criterion of value as to use and occupation is the use which the owner, if in possession, might have made of the property—the profit which the owner, if at liberty to use it, might have made by a lease or sale of it.

A bill to redeem is in the nature of an equitable suit in ejectment; and the reasonable sum to be paid for use and occupation is analogous to the *mesne* profits that follow a suit in ejectment. In the latter a defendant, whether he has actually realized any profits or not, is liable for the rental value of the premises detained by him, or whatever might have been reasonably realized therefrom, either by himself or by the plaintiff. *Fears vs. Merrill*, 9 Ark., 559; *Apalachicola vs. Apal. Land Co.*, 9 Florida, 340.

That this was the intention and meaning of the Supreme Court is plain, because that court knew from the record that the property in question was unimproved city property, which ordinarily has no actual rental value and yields no profits. The Supreme Court must necessarily have meant, if its decision is to be allowed to have any meaning at all, that the defendant was to be charged as though he had rented the property from the complainant.

And there is no difference between the wrongful withholding of land and the wrongful withholding of money. The law allows damages for the latter in accordance with the legal rate of interest, and the same standard should be adopted for the former.

HENRY E. DAVIS for defendant :

The defendant is to be charged with only the value of the use of the property; in no event should he be charged as for speculative or problematical damages, or damages of any kind, to the complainant. He is chargeable only for the natural and ordinary value of the use. 2 Pow. Mort., 1028; *Tucker vs. Buffum*, 16 Pick., 46; *Bainbridge vs. Owen*, 2 J. J. Marsh, 463.

The Supreme Court fixed no rate of charge against the defendant, nor does its language necessarily imply that a

charge is to be made against him in any event. That court merely referred to this court a question of fact, viz.: What is a reasonable sum for use and occupation? What was to the defendant "the natural and ordinary value of the use" of the premises?

The testimony shows, and the court below found, the use and occupation to be valueless; and having so found, the court (Cox, J.) erred in requiring of the defendant anything in the nature of supposed compensation to the complainant for loss by reason of the use and occupation. The principle is not that the mortgagor shall be compensated for all disadvantages to him, but that the mortgagee must not get anything out of his mortgage beyond the debt, interest and expenditures. *Gordon vs. Lewis*, 2 Sumn., 148, p. 155.

In accounting, therefore, the mortgagee is charged with everything representative of value received by him by reason of the mortgage; his possession (especially when lawful, as here) cannot be charged on him as a tort against the mortgagor for which he may be mulcted in damages.

Mr. Chief Justice CARTER delivered the opinion of the court:

This case involves a very simple question. The instructions to this court come from the Supreme Court of the United States, and are dogmatic. We simply have the duty of performing that which we are charged by that court to perform: "The defendant is to be charged with a reasonable sum for the use and occupation of the premises from the time he took possession." A reasonable sum—that is, what it was worth to the defendant.

We would have no trouble about that in an ordinary case. What is the rental worth? The witnesses say, and say very truthfully, that the use and occupation were worth nothing. The property was an unfenced common within the city limits, impracticable of cultivation, impracticable of exclusive occupancy, and in fact unoccupied; the defendant had merely constructive possession of it because he claimed possession.

It is difficult to see how any value could be attached to the use and occupation of property under such circumstances. But it is contended for the complainant that the use of the property is worth six per centum of its value. And what is its value is another matter of speculation. One standard is the assessed valuation, and another the estimated market value. And the defendant has been charged a percentage on valuation, as though the property has a usufruct, as though it were tenantable, as though it were under actual occupancy and yielding something to the mortgagee.

We think that the decrees below are too imaginary, are a departure both from the facts of the case and from the decree of the Supreme Court. The real value of the property is not the measure of the use; the returns the property may give the tenant constitute the value of the use, and there is no other guide. We have come to the same conclusion with the witnesses. The use and occupation of the premises was worth nothing, and, therefore, we will charge nothing for it.

But it is said, further, that the mortgagor was deprived of the power to sell the property; that this controversy arrested his dominion over it. Is a claim on that account a claim for use and occupation? For the rental value of the property? Is it not a claim for unliquidated damages, as for obtruding an obstacle in the way of disposing of the property? It seems to us that that is not germane to use and occupation, and to that we are confined.

There remains but one minor point. The defendant received from the Government of the United States a sum of money for the occupation of the property by the military. Of this sum he paid a portion as a commission to the agent who collected it, and the court below did not credit him with the commission so paid. He should be allowed credit for that sum and be charged only with what he got over and above it.

Decree accordingly.

PATRICK RAGAN vs. PETER CAMPBELL.

EQUITY. No. 5407.

{ Decided October 28, 1883.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. A parol agreement by A with B to purchase and hold real property for the benefit of B is, it *seems*, within the statute of frauds, and if, after the purchase, A refuses to comply with his antecedent agreement, equity will not enforce it.
2. But when such a transaction does not turn upon the mere agreement, but upon conduct which deceives the other party, which misleads him and which it would be fraudulent to deny, the statute of frauds does not apply to such a case, and the question is one of fact. Thus where C agrees verbally with R, whose property is about being foreclosed for default in the payment of a debt secured upon it by deed of trust, that he will attend the sale and purchase the property, and will afterwards convey to R, on being reimbursed, the purchase price, and accordingly attends the sale and announces to the bystanders that he is purchasing the property for R, and thus discourages the bidding, equity will regard such conduct as operating to charge him as a trustee for R, especially when he purchases the property far below its value. And in such case proof of the antecedent agreement will be admissible as going to show one of the elements of the fraudulent device of the defendant in announcing himself at the sale as a purchaser for the benefit of the debtor.
3. A case resting upon such facts stated wherein the court decrees the purchase a resulting trust and directs an account of the rents and profits.

STATEMENT OF THE CASE.

The bill in this case sets out, that October 15, 1874, plaintiff borrowed of Millard Metzger about \$1,000, for which he gave his note secured by deed of trust upon parts of sub-lots 37, 38, 48 and 49, square 209, in the city of Washington, improved by seven frame tenements. Under this deed of trust C. C. Duncanson, surviving trustee, November 7, 1876, advertised the property for sale. That said property was worth \$4,000, and was under a rental of \$75 per month. That the day before the sale plaintiff went to the defendant, who had been his intimate personal friend for many years, and proposed to him to attend the sale and bid a sufficient sum for the property to pay Metzger's debt and hold the property until plaintiff could pay him. Defendant agreed to attend the sale and buy the property in for the plaintiff, and to allow him as long a time as he pleased to pay him; and that upon the plaintiff reimbursing defendant the amount of money he should pay for said property, and all expenses attending the sale, to convey the title of said prop-

erty to the plaintiff. On the 7th day of November, defendant attended said sale with the plaintiff and purchased five of the lots for \$1,175, their real market value being about \$4,000. Defendant said on the day of sale, in the presence of the trustee and others, that he was buying said property for the plaintiff, and that he was to have two months, or longer, in which to pay him the money he (the defendant) had paid for the property. That the trustee had executed a deed to defendant for said property. That about ten days after the date of the trustee's deed, plaintiff went to defendant and asked him if he would be satisfied if he would pay him the interest on said purchase regularly, and defendant said he would not; that he liked the property and thought he had sufficient grounds to back out of said agreement. Plaintiff reminded defendant of their agreement, and defendant admitted there was such an agreement, but the plaintiff became uneasy at his conversation, and in a few days thereafter borrowed the money, and, in the presence of a witness, offered defendant the full amount he paid for said property, together with interest, costs and expenses, which defendant refused. Plaintiff has repeatedly since that time offered to pay defendant said money, which defendant has refused to accept, and the plaintiff now brings said money into court, and prays—

1. That an account be taken of the amount due defendant by plaintiff.
2. That plaintiff may be allowed to pay what shall be thus found due.
3. That upon such payment defendant be required to convey said property to the plaintiff.
4. That the necessary accounts be taken.
5. General relief.

The defendant filed a demurrer to the relief prayed, on the ground that plaintiff's bill stated a case barred by the statute of frauds. No action was taken on this demurrer. Defendant afterwards filed an answer in which he denied that the plaintiff's property was worth \$4,000, and claimed that it was not worth more than \$1,175,

the price he paid for it. He denied the agreement alleged by the plaintiff in reference to the sale of the property, and asserted that he attended the sale as any other bidder and purchased the property with no understanding or agreement with the plaintiff that he would, on being reimbursed his purchase money, &c., convey it to him. He denied having stated in the presence of the trustee, or any other person, that he was buying the property in for the plaintiff, or that the plaintiff should have two months from the day of sale in which to redeem it. He denied the conversation stated in the bill to have been had by plaintiff with defendant about ten days after the sale; and admits that Duncanson, trustee, executed and delivered to him a deed for the property.

Evidence having been taken, the cause came on for hearing in the Special Term, and a decree was entered declaring a resulting trust in the property for the benefit of the plaintiff, and referred the cause to the auditor with directions to state an account between the parties as to the rents and profits as between mortgagor and mortgagee. From this decree the defendant appealed.

BIRNEY & BIRNEY and R. J. MURRAY for complainants :

The statute of frauds constitutes no defence in this case, for equity will at all times lend its aid to defeat a fraud, notwithstanding the statute of frauds. Browne on Statute of Frauds, sec. 488.

In *Taylor vs. Luther*, 2 Sumner, 228, Story, J., said : "Nothing is better settled than that the true construction of the statute of frauds does not exclude the enforcement of parol agreements respecting the sale of lands in cases of fraud. * * * Parol evidence is admissible to show that an absolute deed was intended as a mortgage, and that the defeasance had been omitted or destroyed by fraud or mistake. It is the same if it be omitted by design upon mutual confidence between the parties, for the violation of such an agreement would be a fraud of the most flagrant kind, originating in an open breach of trust against conscience and justice."

The following cases are directly in point with the case at bar, and are sufficient to establish the doctrine that one who at a foreclosure sale undertakes to purchase for the benefit of the mortgagor, and thus acquires the title at a price greatly below its value, will be deemed the trustee of the party for whom he has undertaken the purchase, and will be compelled to convey to him upon tender of the purchase money and interest. *Ryan vs. Dox*, 34 N. Y., 307; *Brown vs. Lynch*, 1 Paige, 147; *Lincoln vs. Wright*, 4 De Gex & Jones, 16; *Jenkins vs. Eldridge*, 3 Story, 181; *Miller vs. Antle*, 2 Bush. (Ky.), 407; *Trapnall vs. Brown*, 19 Ark., 49; *Peebles vs. Reading*, 8 S. & Rawle, 492; *Kendall vs. Mann*, 11 Allen, 15; *Davis vs. Walsh*, 2 Harr. & Johnson, 329; *Botsford vs. Burr*, 2 Johns. Ch.

In such case the purchaser occupies the shoes of the mortgagee, and will be so considered. *Brown vs. Lynch*, 1 Paige, 147; *Reigard vs. McNeil*, 38 Ills., 400; *Boyd vs. McLean*, 1 Johns. Ch., 582; see also *Lingenfelter vs. Ritchie*, 58 Pa. St., 485; *Seichrist's Appeal*, 66 Id., 287.

In other cases it has been held that, although proof of the parol contract would be insufficient to ground relief upon, yet proof of defendant's statements at the sale, and inadequacy of price, will warrant a decree. *Johnson vs. La Motte*, 6 Rich. Eq. (S. C.), 347; *Cox vs. Cox*, 5 Id., 365.

In *Keith vs. Purvis*, 4 Dess., 114, the court says: "Can it be tolerated that a creditor shall, at a sale of his debtor's property, lull him to sleep and keep off other purchasers by an agreement under which he buys in the land for a small sum, much below the value, and then that he should declare that the agreement was void under the statute of frauds, and that the other party should have no benefit from the agreement whilst he reaped all the fruits? Surely not. Courts of justice would be blind, indeed, if they could permit such a state of things."

HINE & THOMAS for defendant:

The decision of this case in the court below went upon the theory of a resulting trust in favor of complainant.

A verbal agreement that another is interested in the purchase of land, or a verbal declaration that he buys land for another, without that other advances the purchase money, comes directly in the teeth of the statute of frauds, and cannot give rise to a resulting trust.

This is the clear result of the cases, both in this country and in England, without, perhaps, a single exception.

The cases of *Irwin vs. Ivers*, 7 Ind., 308, *Kisler vs. Kisler*, 2 Watts, 323, and *Dyer vs. Dyer*, 2 Cox, 92, are examples of the doctrine invoked here.

Lord Keeper Henry (in *Bartlett vs. Pickersgill*, 1 Eden, 515), drawing the distinction between the admission of evidence to prove the advance of purchase money where the trusts result by operation of law, and are exempted from the statute of frauds, and the admission of parol evidence to prove an agreement, said, that to allow parol evidence in the latter case would be to overturn the statute. "The statute," said his lordship, "says that there shall be no trust of land unless by memorandum in writing, except such trusts as arise by operation of law. Where money is actually paid, there the trust arises from the payment of the money, and not from any agreement of the parties. But this is not like the case of money paid by one man and the conveyance taken in the name of another; in that case the bill charges that the estate was bought with the plaintiff's money. If the defendant says he borrowed it of the plaintiff, then the proof will be whether the money was lent or not; but as here the trust depends on the agreement, if I establish the one by parol, I establish the other also. * * * If the plaintiff had paid any part of the purchase money, it would have been a reason for me to admit the evidence."

This salutary doctrine has been upheld both in this country and in England, with firm and steady resolution. To depart from it now, as was done by the learned justice who decided this case below, would, it is respectfully advanced, be to repeal the statute of frauds, rather than to give effect to it.

It is quite unnecessary, we think, to cite in detail the

authorities upon such familiar learning ; they will be found collected in the notes to *Dyer vs. Dyer*, 2 Cox, *supra*. 3 Lead. Cas. in Eq., 314.

Mr. Justice JAMES delivered the opinion of the court.

The evidence in this case shows that Ragan, being the owner of five lots of land in the city of Washington, borrowed about one thousand dollars, and gave as security for the loan a deed of trust to C. C. Duncanson upon the property in question, and when the debt matured Duncanson advertised the property in default of payment. Shortly before the day appointed for the sale the plaintiff applied to Campbell, the defendant, to let him have the money to pay the debt, or to buy the property in for him and allow him to redeem it ; that Campbell agreed that he would attend the sale and purchase the property on behalf of the debtor, Ragan, and allow him to redeem it within a period fixed ; that Campbell did attend the sale, and there said, in the presence of the trustee and of other persons, and of one of the witnesses who relates the story, that he was "buying the property in for the old man."

There is some conflict as to the value of the property, but it appears to be quite clear that it must have been worth something over four thousand dollars. Campbell himself received rents at the rate of ten per cent. on more than five thousand dollars, and received it so soon after the purchase as to show that it was worth at least four thousand dollars, and probably more, at the time of purchase. This value was not by reason of a sudden move in the market. He purchased the property, however, for \$1,175.

Upon this statement of facts, viz., this antecedent parol agreement and this conduct at the sale, which are charged to have been in fraud of the plaintiff, we are asked to declare this purchase to be a trust.

The first ground taken by plaintiff's counsel is that we should do so in the enforcement of the parol agreement. Cases were cited to us from New York and elsewhere, showing that this has been done in some courts. We have

examined those cases. I have read them with care, and the question is one of great conflict. Some of the courts, it is true, and even so eminent a lawyer as Justice Story, have gone so far as to say that where a parol agreement, which would otherwise come within the Statute of Frauds, is made under circumstances which induce the other party to trust to it and act upon it, it becomes a fraud not to execute it; and that the Statute of Frauds was not intended to encourage fraud, but to prevent it, and, therefore, did not apply to such a case.

There are many cases to the contrary, however, and on a very full examination of them with great care, we are satisfied that the better rule is against enforcing a parol agreement which would virtually require us to set aside the Statute of Frauds. So, that if this case rested simply upon this antecedent parol agreement that the defendant, Campbell, would buy this property for the benefit of the plaintiff, we should decline to enforce it. But there is another reason which does not come within the principle of the Statute, and which we think applies to this case. When the transaction does not turn upon the mere agreement, but upon conduct which deceives the other party, which misleads him, and which it would be fraudulent to deny, the Statute of Frauds does not apply to that case; that is a question simply of fact. Now it has been held in a number of cases that where a purchaser goes to a sale and announces to the bystanders that he is buying for the benefit of the debtor, and thus discourages the bidding, as he naturally does, the effect of his conduct should, itself, operate to charge him as a trustee, especially when he purchases the property far below its value. Here he received forty-five dollars a month rent for this property, which would be over ten per cent. on five thousand dollars, and he bought it in for \$1,175. It is said there was another bidder there, and Mr. Duncanson, the trustee, himself, said that the property brought a fair price. But his opinion is not to be put against the fact that the property was a good renting property at five thousand dollars.

We are of opinion, therefore, that the purchaser got this

property far below its value by reason of holding himself out at the sale as a purchaser for the benefit of the debtor. With this knowledge no other person would compete for the purchase, as he would know that a purchaser for the debtor would be under no obligation to be subject to his bid. He might bid this property off at six thousand dollars, but it would be immaterial to him because he would not have to pay the money out; all that he would have to do would be to pay over the amount of the debt to the trustee who would have nothing to do with it after he had received the amount due, and then the property would return to the original debtor and the purchaser. It is for that reason that such an announcement at a sale discourages bidding, and it would be an inducement for a purchaser to hold himself out as bidding for the debtor, thus running the property down below its value, and then to disappoint the owner of the equity of redemption. Moreover, it may happen—though there is no proof to that effect in this case—that the owner of the property has ceased from making efforts to save it, if he understands what is being done at the sale, relying upon his agreement with the purchaser.

I have stated that the cases do not seem to establish the doctrine that the antecedent agreement may be enforced, but they do allow this, that proof of the antecedent agreement may be admitted as going to show one of the elements of the fraudulent device of the defendant in announcing himself at the sale as a purchaser for the benefit of the debtor.

With these views, therefore, we affirm the decree below, and send the case back that an account may be taken that shall cover the receipt of rents.

W. T. JOHNSON vs. FREDERICK DOUGLASS.

AT LAW. No. 20,394.

{ Decided October 23, 1882.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. The 65th rule of court requires bills of exceptions to be settled before the close of the term which may be prolonged for that purpose. A bill of exceptions was brought to the court in General Term, dated twenty-seven days after the close of the term at which the case was tried, while no prolongation of the term was shown to have been ordered. On the other hand the entry in the minutes of the court stated that the bill of exceptions taken in the case had been signed and sealed on the last day of the term.

Held, That the court, having the ends of justice in view, would, in such a conflict of dates, give weight to the statement of the minutes and treat the bill as having been signed during the term.

2. A married woman may acquire title to property either by gift or by sale, and when the title is not derived from her husband, it becomes her separate property under the Married Woman's Act, and she is competent to make contracts concerning it.

3. Delivery is not necessary to a transfer of title to personalty, if the vendor and vendee agree that the title is in the vendee, at once and without any further act, it changes hands by that agreement, although no delivery is made.

4. The fact that the vendor consents to the execution by the vendee of a deed of trust upon the goods, is one of the strongest proofs of an intention to pass the title to the property, although no actual delivery of it had been made.

5. Secs. 677-679, R. S. D. C., give the landlord a lien for his rent upon the goods of the tenant, and not upon the goods of other persons which are upon the demised premises.

6. Where the tenant's goods are encumbered by a chattel trust prior to being placed upon the demised premises, the landlord's lien fastens upon the goods subject to the trustee's paramount right of property and possession.

STATEMENT OF THE CASE.

MOTION for new trial on exceptions.

This was an action of replevin instituted by the trustee in a chattel deed of trust to recover possession of furniture taken in attachment for arrears of rent. It appeared from the evidence that at the time of the purchase of the furniture, and while it was still in the store of the furniture dealer, the purchaser (Mrs. Spaid) conveyed it by a chattel deed of trust to the plaintiff as trustee to secure to the vendor the unpaid purchase-money. The furniture was then removed from the store and placed in the Owen House, of which Mrs. Spaid was the lessee, where it was subsequently

attached for arrears of rent, under the provisions of sections 677, 678 and 679, R. S. D. C. Whereupon the trustee in behalf of the vendor, brought this action of replevin.

At the trial the court instructed the jury that "if the jury find that the goods replevied in this action were in the Owen House at the time the attachment for rent in arrear was levied, then the said goods were responsible for the rent due, notwithstanding the execution of the deed of trust to the plaintiff and the verdict should be for the defendant." The jury, under this instruction, returned a verdict for the defendant.

The case was tried during the October Term of the Circuit Court, December 15th and 16th, 1881; but the bill of exceptions tendered by the plaintiff purported to be signed and sealed by the justice "this 10th day of February, 1882, *nunc pro tunc*," although it was endorsed by the clerk as filed January 14, 1882.

On the 14th of January, 1882, the court adjourned the October Term, the following entry being made upon that day in the minutes of the court:

"William T. Johnson, trustee, *vs.* Frederick Douglass. Now again comes here the plaintiff, by his said attorney, and tenders to the court here his bill of exceptions to the ruling of the court on the trial of this case and prays that they may be duly signed, sealed and made a part of the record, which is done accordingly."

The 65th rule of court required that "the bill of exceptions must be settled before the close of the term, which may be prolonged by adjournment in order to prepare it." The minutes of the court did not show that there had been any prolongation of the term for that purpose.

A. C. BRADLEY and N. H. MILLER for plaintiff:

1. The bill of exceptions in this case is marked by the clerk "filed January 14, 1882;" it is entered in the minutes as filed upon that day before the adjournment; it is signed by the justice who presided at the trial as to each bill as an exception taken at the trial before the jury retired, and

with the exception of the actual date given to it conforms in every respect to the requirements of law.

In the case of the *United States vs. Wilkinson*, 12 How., 246, the date of the bill of exceptions was April 8, 1848, trial was not had till the 7th and 8th of May, 1849, it was insisted that it could not be regarded by the court as legally taken ; the court, however, held that the bill must be regarded as regular, and part of the proceedings.

In *Stanton vs. Embry*, 93 U. S., 554, the point was made that the bill of exceptions was not settled and filed as required by rules of this court, but the objection was overruled on the authority of 2 Black, 568, see page 556.

In *U. S. vs. Breitling*, 20 How., 252, it is held that when the bill was signed after the adjournment, and without consent of counsel (although a rule of court provided that no bill should be signed after adjournment without consent of counsel), under the special circumstances the court will consider the exception properly before it and the court said, "and the time within which it may be drawn out and presented to the court must depend on its rules and practice, and on its own judicial discretion. In the case before us the judge who tried the case has deemed it his duty to seal and certify the exception to this court, and under the circumstances stated in the exception and note, we think he was right in doing so, and that this exception is legally before this court as a part of the record of the proceedings of the court below."

So that if the case was an ordinary one tried by the justice holding that term of the court, we insist that the integrity of the bills of exception is unimpaired by the attacks made upon them, and that even in the Supreme Court of the United States they would be sustained.

2. The sale by Breitbarth to Mrs. Spaid of the specific chattels described in the deed of trust, and replevied in this action, the terms of sale having been complied with, passed the property therein, although there was no actual delivery thereof at the time. *Benjamin Sales*, secs. 315, 679, and cases cited ; *Dixon vs. Yates*, 5 B. and Ad., 313-333 ; *Warden*

vs. Marshall, 99 Mass., 306 ; *Marble vs. Moore*, 102 Mass., 443 ; *Barrett vs. Goddard*, 37 Mass., 111 ; *Terry vs. Wheeler*, 25 N. Y., 524 ; *Means vs. Williamson*, 3 Me., 556 ; *Hotchkiss vs. Hunt*, 49 Me., 218 ; *Bethel Steam Mill Co. vs. Brown*, 57 Me., 9 ; *Olyphant vs. Baker*, 5 Denio, 379 ; *Hooten v. Bidwell*, 16 O., 509.

The deed of trust to the plaintiff was executed and recorded before the goods were placed upon the leased premises. It was given to secure the deferred payments of the purchase-money for the goods. The vendor parted with the title and possession only upon this security, and the lien of the landlord is subordinate to the deed of trust. Rev. Stat. D. C., sec. 678 ; *Webb vs. Sharp*, 13 Wall., 14.

The tenant, Mrs. Spaid, was a married woman living with her husband, having no separate property, so far as the record shows, and if she had separate estate, the contract of renting was not such a contract as could be enforced against her by an action at law, and the proceedings in the action at law are void as against this plaintiff. *Rich vs. Hyatt*, 3 Mac A., 536, 547 ; *Bank vs. Partee*, 99 U. S., 325 ; *Griffith vs. Clark*, 18 Md., 457 ; *Morse vs. Tappan*, 3 Gray, 411 ; *Dorrance vs. Scott*, 3 Whart., 309 ; *Norton vs. Meador*, 4 Sawyer, 604 ; *Caldwell vs. Walters*, 18 Pa. St., 79 ; *Leonard vs. Bryant*, 11 Met., 370 ; *Buffum vs. Ramsdell*, 55 Me., 252 ; *Nason vs. Blaisdell*, 12 Vt., 165 ; *Vose vs. Morton*, 4 Cush., 27 ; *Caswell vs. Caswell*, 28 Me., 237.

ROSS & DEAN and DAVID S. HOUNSHELL for defendant :

The minutes of the court show that the appellant, on the 14th day of January, 1882, tendered a bill of exceptions to the rulings of the court on the trial, and that said exceptions were signed, sealed and made a part of the record. But this court, upon inspection of the papers called "exceptions," will find that said papers bear a different date and do not relate to the 14th day of January, 1882, at all. They call for another day, to wit: December 16, 1881. These papers, erroneously denominated exceptions, themselves bear date February 10, 1882, twenty-seven days after the term ended.

Where is the bill of exceptions, settled and made part of the record, January 14, 1882 ?

There is no bill of exceptions of that date presented with the transcript ; neither was there any order of court canceling that bill of exceptions and allowing time for the settling of another.

The 65th rule of the court requires that the bill of exceptions must be settled within the term at which the case was tried, in the absence of any order to the contrary.

In this case there was no order of adjournment or prolongation of the term for any such purpose.

Phillips' Practice states the law thus :

"The bill must be signed and filed with the term at which the judgment was rendered, without an express order of the court *during the term* permitting the delay, or where there has been consent of parties to the delay, save under very extraordinary circumstances. The case of *United States vs. Breitling* goes to the extreme verge of the law." Phillips' Practice (1878 Ed.), p. 191, *citing* *Muhler vs. Ehlers*, 91 U. S., 250 ; *Jones & Morris vs. Sewing Machine Co.*, Opinion Sup. Ct., Oct. Term, 1877, p. 520 : And see also *Minor's Inst.*, vol. 4, p. 89 ; 1 Salk., 288 ; Bacon's Abr., title, "Bill of Exceptions ;" *Ex parte Bradstreet*, 4 Peters, 107 ; 6 How., 275.

In the case of *Stanton vs. Embry*, 93 U. S., 554, the bill of exceptions was signed during the term the case was tried, though not filed until afterward.

The papers vouched and miscalled "bills of exceptions" are signed twenty-seven days after the court adjourned. They are intended by the appellant to put upon the record certain exceptions to the rulings of the court at the trial on December 15 and 16, 1882, but in the interim, to wit, on the 14th of January, 1882, the minutes of the court on that day, which was the last day of the October Term, 1881, show that a bill of exceptions was on that day tendered, signed and sealed, and made a part of the record. Surely a bill of exceptions signed twenty-seven days after the term had ended cannot be substituted for the one of the 14th of January,

which was on that day signed, sealed, and made a part of the record. No greater evil could arise than to contradict a record in this manner.

Mr. Justice JAMES delivered the opinion of the court :

It is claimed by the appellee that this case is not properly here, for want of a bill of exceptions. The bill shown to us appears to be dated the 10th of February, while the minutes of the Circuit Court state, under the date of 14th of January, that the court adjourned finally on that day. They state also that on that day a bill of exceptions was duly signed. Of course we are not to presume that the judge signed two sets of bills of exceptions. On the record, then, the case stands thus : the date of the bill names a day which fell after the adjournment of the court term ; the minutes state that it was signed on the last day of the term. We shall treat this bill as having been signed during the term. As we understand counsel on both sides to say that, as a matter of fact, the *entry* of final adjournment was not made until after the bill of exceptions was signed, we conceive that the ends of justice are served by giving weight to the statement of the record that the bill was so signed, notwithstanding the conflict of dates. We shall consider, therefore, the questions raised and argued upon the exceptions presented.

It was objected that Mrs. Spaid, being a married woman, could not purchase the furniture taken under the writ of replevin, and could not execute a valid deed of trust to the vendor to secure the price. Neither of these propositions is correct. She could acquire *title* either by gift or by sale to her. As this title was derived, not from her husband, but from a stranger, the furniture became her separate property, under the Married Woman's Act, and she was competent to make contracts concerning it. She could convey it absolutely or mortgage it or pledge it. It was next objected that the deed of trust was executed by Mrs. Spaid before the goods were delivered to her, and, therefore, before title had passed to her by the contract of sale. But delivery is not necessary to a transfer of title to personalty. If the

vendor and vendee agree that the title is in the vendee at once and without any further act, it changes hands by that agreement although no delivery is made. It is plain that the contract of the parties intended to pass the title in this case, and one of the strongest proofs of that intention was the fact that the vendee executed and the vendor accepted a deed of trust which assumed that the title had first passed to the vendee by the contract of sale.

After the execution of this deed of trust the property was placed in the Owen House, which was carried on by Mrs. Spaid, and it is claimed that the landlord had a lien on it for arrears of rent, and that his right of possession under his attachment was paramount to that of the trustee under his deed of trust. The statute relating to landlords and tenant (Sec. 677-679 R. S. D. C.), gives to the landlord a lien upon *the goods of the tenant*, and not upon the goods of other persons which are upon the demised premises. It is true that the tenant in this case had an interest in the property in question, but the legal title and the right of possession upon default of payment were in the trustee. It was only subject to this right of the trustee that the landlord's lien could attach. He fastens his lien upon the property just as he finds it; in other words subject to the trustee's paramount right of property and possession. The instruction to the jury stated a contrary doctrine.

Judgment is therefore reversed and the cause is remanded for a new trial.

JAMES S. EDWARDS, ASSIGNEE IN BANKRUPTCY OF THOS. B.
ENTWISLE, AND OF ENTWISLE & BARRON, COPARTNERS.

vs.

THOMAS B. ENTWISLE, MARY M. ENTWISLE, HIS WIFE,
AND OTHERS.

EQUITY. No. 6452.

{ Decided October 23, 1883.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. Evidence of intent to defraud existing creditors by a voluntary conveyance of property by one largely indebted is *prima facie* evidence of fraud against subsequent creditors, but not conclusive; it may be rebutted by showing that the existing debts were secured by mortgage, or were provided for in the settlement itself, or that they have since been fully paid off. But when those debts are paid off by creating new debts, as by borrowing money, or by purchasing goods on credit and out of the proceeds, which ought to be applied to pay the purchase price, discharging the antecedent debt, or in any way which only relieves an indebtedness in one direction by increasing it in another, the case is to be treated as if the prior indebtedness had continued throughout.
2. Where a voluntary conveyance is void as against creditors, those acquisitions of the donee, which are the mere fruit and outgrowth of the property conveyed, share the same fate.
3. The burden of proof is upon the wife, when she claims that expenditures made in the purchase and improvement of property are from her separate estate.
4. In the District of Columbia the labor of the wife and the earnings resulting therefrom are the legal property of the husband.
5. Where, in the case of a voluntary conveyance, it is shown that the donor had continued all the time to pay the taxes and repairs and interest on encumbrances, and had raised money on the property, for his own use, by deed of trust, and had also applied the largest part of the proceeds of a sale of a part of it to his own use, these, or such facts, will be conclusive evidence to a court of equity that the conveyance was a mere cloak to protect the property from creditors; and where the donee is the wife the force of the evidence is a question of degree only; her allowance of such a control and beneficial use by her husband of property previously settled upon her by him, is at the risk of having it declared responsible for his debts.
6. It is sufficient in a bill brought to have a conveyance set aside on the ground that it was made with intent to defraud creditors that the complainant state a *prima facie* case, to be afterwards established by proof; mere matters of *evidence* on the general question of fraudulent intent need not be made the subject of special averment.
7. Where a partner uses the funds of the partnership to purchase property and settle it upon his wife, creditors of the partnership may pursue the property in equity.—*Concurring opinion.*

STATEMENT OF THE CASE.

On May 6, 1878, Thomas B. Entwisle and George O. Barron, copartners, doing business under the firm name of

Entwisle & Barron, were, as a firm and individually, on their own petition, adjudicated bankrupts. The assets, as returned in the bankruptcy schedule, were merely nominal.

At the date of the adjudication, certain real estate in this city, of the assessed value of \$16,967, stood in the name of, and was held in trust for, Mary M. Entwisle, the wife of the senior member of the firm. This property was conveyed to Mrs. Entwisle, and for her use, between January, 1864, and May, 1873. In March, 1866, another building lot was conveyed to the use of this lady, which, with the improvements thereon, was sold in April, 1874, for \$11,500.

The plaintiff, who is the assignee in bankruptcy, filed this bill to have these conveyances set aside as fraudulent and void, and the same decreed the property of the husband and assets in the hands of the assignee.

All the allegations of fraud were fully denied in the answers, and the defence set up was that these various pieces of property were purchased by Mary M. Entwisle out of the profits derived from one piece, that known as lot 37, in square No. 127, and by loans effected on said piece of real estate, which property was settled upon her by her husband on January 19, 1864.

The testimony was very voluminous, but the facts as found by the court appear in the opinion.

EDWARDS & BARNARD for complainant :

1. Conceding that the money claimed to have been used in the purchase of any of the property in controversy was derived through the wife's earnings in taking boarders and renting rooms while residing and cohabiting with her husband, such earnings belong to the husband at common law and are not made her property by any statutory enactment of force in this District. *Seitz vs. Mitchell*, 94 U. S., 580 ; R. S. D. C., sec. 789.

Gifts of this character by a husband to his wife, as against creditors, are subject to the same rules which apply to other voluntary conveyances. *Schouler's Dom. Rel.*, 243.

2. Subsequent creditors may impeach a voluntary convey-

ance by showing antecedent debts sufficient in amount to afford a reasonable evidence of a fraudulent intent. The intent to defraud antecedent creditors is *prima facie* evidence of an intent to defraud subsequent creditors. Bump Fraud. Conv., 326, and cases cited.

"If an individual, being in debt, shall make a voluntary conveyance of his entire properoy, it would be a clear case of fraud." Parish *vs.* Murphree, 18 Howard ; Pratt *vs.* Curtis, 6 Bank. Reg., 139 ; Kehr *vs.* Smith, 20 Wal., 31.

The true principle is that a fraudulent intent against one or more creditors is fraudulent against all, and the statute justifies no other distinction between prior and subsequent creditors than that which arises from the necessity of showing a fraudulent intent against some creditor, which cannot be done in behalf of creditors whose demands were not in existence at the time of the conveyance, but by proving either *a prior indebtedness* or a prospective fraud against them only. It is accordingly settled that if the donor is insolvent at the time of the transfer, the conveyance is void as against subsequent creditors. Bump Fraud. Conv., 326, 327 ; Walker *vs.* Burrows, 1 Atk., 94 ; King *vs.* Wilcox, 11 Paige, 589 ; 1 Story Eq., sec. 361.

Entwisle incurred other obligations, and used the means of his subsequent creditors to pay off those existing at the time of the first settlement.

The inference of fraud which arises from the existence of debts at the time of the conveyance is not repelled by proof that such debts have been paid, if it appears that such payment be made by incurring other liabilities ; and, as in this case, there be a continuous indebtedness terminating in bankruptcy.

Payment alone of the prior debts will not render the transaction valid, if by so doing others to an equal amount are contracted. In such instances the subsequent creditors are subrogated to the rights of the creditors whose debts their means have been used to pay.

Bump Fraud. Conv., 327-328 ; Paulk *vs.* Cook, 39 Conn., 566 ; Antrim, assignee, *vs.* Kelly et al., 4 Bank. Reg., 189,

587 ; *Savage vs. Murphy*, 84 N. Y., 508 ; *Whittington vs. Jennings*, 6 Simonds, 493.

Entwisle admits the firm to have been in embarrassed circumstances since about the year 1869. During this period he appropriated \$6,088.50 of the firm's moneys to pay debts due by him when the first settlement on his wife was made.

3. The purchase money for and expenditures on account of the property in controversy having, to a considerable extent, been made with partnership funds, a trust results to the partnership. *Perry on Trusts*, 189.

Trust funds diverted from the trust may be pursued so long as they can be identified, or even as long as they form part of a fund which can be identified. *Oliver vs. Piatt*, 3 How., 333 ; *Van Allen vs. American Bank*, 52 N. Y., 1 ; *Kelly vs. Greenleaf*, 3 Story C. C. R., 93.

The property sought to be recovered is, in contemplation of law, assets of the firm ; or if not wholly so then to the extent of firm moneys spent upon or applied on account of it, and the complainant, as the representative of the firm, is entitled to recover the property without regard to the question whether or not the conveyances were made in fraud of Entwisle's creditors.

A firm is in law distinct from the members who comprise it, and a transfer of the firm property to pay the separate debts of one of the partners, is a voluntary conveyance. *Bump Fraud. Conv.*, 255, and cases cited.

An appropriation of firm property to pay the individual debt of one of the partners is in effect a gift from the firm to the partner, and the attempt to assign partnership property to pay the private debts of one of the partners before the firm debts are paid when the firm is insolvent, affords a conclusive presumption of an actual fraudulent design on the part of debtors. *Ib.*, 390.

A partner cannot appropriate firm property to the private use of himself and his wife without the intelligent consent of his co-partner, nor even with such assent if the assent is given in fraud of creditors. *Kelly vs. Greenleaf*, 3 Story C.

C. R., 93 ; Cox *vs.* McBurney, 2 Sandf., 561 ; Burton *vs.* Tisdale, 4 Barb., 471.

5. Every payment by Entwisle, either with his own or the firm's money, to his wife, or on account of the property settled on her, was a new and separate conveyance to her and for her benefit. Any expenditures upon it gave greater value to her estate. This was known to Entwisle, and if any part of his proceedings fall within the censure of the law, we are justified in considering that as reflecting upon what preceded it ; if he was not honest in turning the property of his creditors into the lap of his wife during the admitted financial embarrassment of the firm, we shall be justified in characterizing in like manner what took place during the four or five years which preceded this confessed embarrassment. Per Justice Hunt in Sedgwick, assignee of Place, *vs.* Phipps *et al.*, U. S. C. C. Southern District of N. Y., decided May 18, 1874. See also same case in 95 U. S., 8.

During and since 1874, the gifts to Mrs. Entwisle, and conversion of firm's moneys for her benefit and of the property now sought to be recovered, amount to \$4,649.05.

6. Purchasers of real or personal property made during coverture, by the wife of an insolvent debtor, are justly regarded with suspicion. She cannot prevail in contests between his creditors and her, involving their right to subject property so acquired to the payment of his debts, unless the presumption that it was not paid for out of her separate estate be overcome by affirmative proof. Seitz *vs.* Mitchell, 94 U. S., 580 ; Muirhead, assignee, *vs.* Aldridge, 14 Bank. Reg., 249.

7. The bankrupt act vests in the assignee all property conveyed in fraud of creditors. It clothes him with the entire title, notwithstanding such conveyance or encumbrance, and makes it *his duty* to invoke the proper jurisdiction to annul the fraudulent proceedings. *In re* Wynne, 4 Bank. Reg., 23 ; Bump Bank., p. 526, and cases cited ; *In re* Elam Rust, 1 N. Y. Legal Obs., 326 ; cited in Bump on Bankruptcy, p. 496.

The proceedings in bankruptcy arrest the ordinary pro-

ceedings of creditors to obtain judgments, and thereby to secure an appropriation of the debtors' property to their use, and the assignee represents them. He is trustee for them, and whatever right they might assert as creditors if they had obtained judgments he may assert for their benefit, whether it be to set aside conveyances which are fraudulent and void as against creditors or which are otherwise as against them invalid. *In re Simon Leland et al.*, 10 Blatch., 508; *Bump Bank.*, 497; *Barker vs. Smith et al.*, 12 Bank. Reg., 474; *Kane vs. Rice*, 10 Bank. Reg., 469; *Bump Bank.*, 497; *Glenny vs. Langdon*, 98 U. S., 20.

An assignee may maintain an action to set aside fraudulent conveyances made by the debtor before he was adjudged a bankrupt, and even before the bankrupt act was passed. *Bradshaw vs. Klein*, 1 Bank. Reg., 542; *Bump Bank.*, 527.

W. D. DAVIDGE and H. W. GARNETT for defendants :

This bill is filed under the act of 13 Eliz., ch. 5, for setting aside fraudulent conveyances. In the construction of this statute the distinction between antecedent and subsequent creditors has been very strongly and plainly laid down. Against an antecedent creditor a voluntary conveyance is void, but not against a subsequent creditor.

The reason is given in *Williams vs. Banks*, 11 Md., 249.

"The registration laws of Maryland were designed to give, and do give notice, which is binding upon all the world, and a person who, at the time of becoming a creditor, is aware of the existence of a deed, cannot in any just sense be considered as disturbed, hindered, delayed or defrauded by it." Also *Aiken vs. Bruen*, 21 Ind., 137; also *Chaffin vs. Heirs of Kimball*, 23 Ill., 34.

These creditors must show that they were in some manner disturbed, hindered, delayed or defrauded by this deed of 1864. It is not enough to show that the grantor was in debt at that time; those debts having all been settled. There is not before the court in this case one who can or does claim that his debt had a commencement for at least five years after this settlement was made; nor can they show

any connection between their debts and those which existed in 1864; they fail to show affirmatively that it was made to "disturb, hinder, delay or defraud them," and the lapse of time is too great for a presumption that in 1864 the grantor intended to defraud creditors whom he did not commence to owe for years, and when he failed in business fourteen years after the settlement. These creditors must show that the fraud was intended upon them individually. The rule is laid down in *Kane, Sheriff, vs. Roberts et al.*, Executors, 40 Md., p. 590: "A deed fraudulent and void as against the grantor's antecedent creditors is valid if recorded, as against subsequent creditors where there is nothing in the deed itself, and no evidence to show any intent or design to defraud such creditors." The Supreme Court of the United States, in *Hinde's Lessee vs. Longworth*, 11 Wheat., 211, states the law in the same way: a voluntary deed is void only as to antecedent and not subsequent creditors, unless made with a fraudulent intent.

And the same court in *Smith et al. vs. Vodges, Assignee*, 2 Otto, 183, shows that this fraudulent intent must be had with regard to those particular creditors of the grantor, who attack the deed, and whose rights he expected to shortly accrue when he made the deed. The language is:

"In order to defeat a settlement by a husband upon his wife, it must be intended to defraud existing creditors, or creditors whose rights are expected shortly to supervene, or those whose rights may and do supervene."

Mr. Bump, in his work on *Fraudulent Conveyances*, states it: "The conveyance must be made with an intent to put the property out of the reach of debts, which the grantor at the time of the conveyance intends to contract, and which he does not intend to pay, or has reasonable grounds to believe that he may not be able to pay." (P. 323.)

The same law is laid down in *Webb's Adm'r vs. Roff et al.*, 9 Ohio St., 430.

"That a conveyance made without consideration, by one indebted at the time, cannot be avoided by subsequent cred-

itors without showing actual fraud or a secret trust for the benefit of the grantor." See 484, 485 and 486.

In *Snyder vs. Christ*, 89 Penn. St., p. 499, the court held that though a fraudulent motive for the conveyance could fairly be inferred from the grantor having entered into a new and hazardous business, or from his having contracted large debts immediately thereafter, yet a mere expectation of future indebtedness, or intent to contract debts, not coupled with a purpose to convey the property to keep it from the reach of creditors, is not within the letter or spirit of 13 Elizabeth.

To render a voluntary conveyance void as to subsequent creditors, it must appear that it was made in contemplation of future indebtedness. *Waterson vs. Wilson*, 1 Grant's Cases, (Pa.) 74.

Whether the deed is void as to subsequent creditors depends on the intent with which it was made. *Mixell vs. Luttz*, 34 Ill., 382 ; see *Pike et al. vs. Miles*, 23 Wis., 164.

A voluntary conveyance by the husband to a third party, and a like conveyance of the same by the grantee to the wife, are not void as to subsequent creditors of the husband without other *indicia* of fraud. *Lloyd vs. Bunce*, 41 Iowa, 660.

A creditor of the husband cannot impeach a conveyance of real estate to the wife on the ground that it was so conveyed for the purpose of defrauding the creditors of the husband when the conveyance was made before the debt due to such creditor was contracted. *Aliter*, when the conveyance was made with a view to defraud the creditor in a transaction contemplated at the time of the conveyance. *Whitescarver et ux. vs. Bonney*, 9 Iowa, 480.

Evidence that a grantor, after making a conveyance of land, paid the debts which he owed at the time thereof, is competent to be considered in determining whether or not it was made in fraud of his existing creditors, and is properly submitted to the jury. It is not, however, conclusive. *Winchester vs. Charter*, 97 Mass., 140.

Whether such a conveyance is fraudulent or not is a

question of fact to be determined under all the circumstances under which it was made. *Same vs. Same*, 102 Mass., 272.

A voluntary conveyance or settlement will be presumed fraudulent as against existing creditors. But as to subsequent creditors there is no such presumption, and fraud in fact must be established. *Nicholas vs. Ward*, 1 Head, p. 324.

Fraud is always a question of fact with reference to the intention of the grantor ; every case depends upon its circumstances. *Lloyd et al. vs. Fulton*, 1 Otto, 485 ; *Dygart vs. Remerschneider et al.*, 32 N. Y., 636.

Fraud is never to be presumed, but must be established by proof. *Conrad vs. Nicholl*, 4 Pet., 296.

Where the material allegations of the bill are distinctly denied by the answer, no relief can be granted upon circumstantial and argumentative testimony, even though the court may feel that there is ground for suspicion. *Parker vs. Phetterplace*, 1 Wall., 684.

In this case the title never was in Thomas B. Entwisle ; the language also of Chief-Justice Marshall, in *Sexton vs. Wheaton*, 8 Wheat., 251-2 applies : " In this District every deed must be recorded in a place prescribed by law ; all titles to land are placed upon the record, the person who trusts another on the faith of his real property knows where he may apply to ascertain the nature of the title held by the person to whom he is about to give credit. In this case the title never was in Joseph Wheaton. His creditors, therefore, never had any right to trust him on the faith of this house and lot."

In the case of *Offutt et al. vs. King et al.*, 1 Mac A., 818, this court says :

" The record constructively was an open and notorious notice to those who dealt with the grantor that they were not to trust him on the faith of his property, and more than a year elapsed before the first transaction with either of them, nor is there a particle of evidence that Shelton contemplated dealing with either of them when he made the conveyance."

In the case at bar more than *five* years elapsed before the first of the present debts was made, and there is no evidence whatever that Entwisle contemplated dealing with any of these creditors when the settlement was made.

The record contained evidence tending to show that Thomas B. Entwisle acted toward this property as if he controlled it; there is no evidence whatever to show that such acts were done in the presence of or shown to Mrs. Entwisle; and even if she had known them she would not be estopped in any manner by them. *Bank of U. S. vs. Lee*, 13 Pet., 107; *Sexton vs. Wheaton*, 8 Wheat., 229.

And any argument which might be drawn from this evidence is weakened, if not destroyed, when the relation between the parties is considered. Mrs. Entwisle was at perfect liberty to employ her husband as her agent in the management of her property, and the evidence discloses the fact that he was more than repaid by her from her separate means for any small advance he may have made.

Mr. Justice Cox delivered the opinion of the court.

The object of this suit is to have certain conveyances of real estate, heretofore made to, or in trust for, Mrs. Entwisle, declared fraudulent and void as against the creditors of Entwisle & Barron, and to subject the property conveyed to the payment of their debts.

The conveyances referred to in the bill are as follows, viz.:

On January 9th, 1864, lot 3 in subdivision of part of square 127, in Washington, was purchased of Samuel V. Niles for \$2,638.35, and conveyed by him to John Larcombe, in trust for the exclusive use of Mrs. Entwisle.

On March 12, 1866, lot 2 in the same subdivision was bought from Wm. W. Corcoran for \$2,550, and conveyed by him to Larcombe and Thomas Berry on the same trusts.

On April 19th, 1872, part of lot 7 in square 75 was bought from George P. Hamlin for \$2,600, and conveyed by him directly to Mrs. Entwisle.

On May 3, 1873, lot 11 in square 28 was bought from

Wm. J. Wilson for \$1,828.40, and by him conveyed directly to Mrs. Entwisle.

The first lot was improved by Entwisle, by the erection of a brick dwelling.

The second lot was improved in the same manner, and afterwards sold to Philip Phillips, and is not embraced in this suit.

The third lot was already improved when purchased.

The fourth lot was subdivided, after the purchase, and improved by the erection of two or more frame houses.

In 1878, Entwisle & Barron were adjudicated bankrupts, being then indebted to the amount of \$50,000, and exhibiting no assets.

At that time the title to the first, third and fourth of the above lots remained as shown in the conveyance above recited, and the property was of the assessed value of about \$17,000.

It is claimed on the part of the complainant that these several lots were purchased and the improvements erected on them, by Entwisle, partly with his own means, but principally with the means of Entwisle & Barron; that he, from time to time, paid large sums of money from the firm resources, on account of the same property, for taxes and repairs and interest on incumbrances, which sums were so many additional settlements on his wife; that these settlements were without consideration and voluntary; that during the period of these outlays he and Barron had no property other than the current receipts of their business, and were largely indebted and embarrassed; that the property before described was conveyed by Entwisle's procurement, to his wife, to protect it from his creditors, and all the settlements were in fraud of those creditors, and the property ought, therefore, to be held as assets for payment of their debts.

For the defence it is claimed that, although the first settlement of 1864 might have been assailed by then existing creditors, these have long since been paid, and there are no debts now in existence antedating 1869, and for the purposes of this case, and as to the creditors represented by the

assignee, that settlement must therefore be deemed valid ; that the other purchases were made and the improvements erected on the property so purchased, partly with money borrowed by Mrs. Entwisle from J. S. Bartruff, which is still unpaid, and partly with the income derived by her from the first property bought from Niles, and are therefore entitled to the same protection from creditors ; that the payments made by Entwisle, from time to time, for taxes, repairs and interest, and which may be claimed to have gone into the property, were fully reimbursed by the return to him, for the business of the firm, of \$8,000 from the proceeds of the sale to Phillips.

Thomas B. Entwisle first failed in business in 1856. Shortly after this he entered into partnership with Barron.

In 1864, and at the date of the first conveyance to his wife, a large amount of his debts remained unpaid. Perhaps more than half the amount had been overdue for more than three years, but it does not appear how far the defence of limitations could have been successfully made to them. But there remained, confessedly, some \$5,000 or more of these debts which might have been sued on. It is admitted that the Niles lot was purchased and the improvements on it erected, in part, with the proceeds of a farm sold by Entwisle, from which he realized some \$5,000. The additional cost of the improvements came from the funds of Entwisle & Barron. This farm was all the property that Entwisle then owned, and Barron had none. It was then a voluntary settlement by Entwisle, on his wife, of all his property, when he was indebted in an amount fully equal to the value of the property so settled, if not twice as large. His business prospects are said to have been good at that time, and he may have had abundant reason to expect to pay all these debts from the profits of his business ; but nothing is better settled than that a debtor is not allowed to give away all his property to his family and leave his creditors nothing to rely on but his expectations. It seems to be conceded by the defence, or not seriously contested, that this settlement could

not have prevailed against the creditors of that date, had they chosen to attack it.

The rule formerly held on this subject by Chancellor Kent and others was very strict. It was, that a voluntary conveyance by a debtor was absolutely void as against existing creditors, no matter how small the proportion of the property conveyed to the rest of his property. The fraud was deemed a conclusion of law, without reference to the actual intent of the debtor, and that, although he may have had abundant property to pay his debts with. It was seen, however, that to enforce so harsh a view in favor of subsequent creditors also, would be unreasonable. And hence, as to them, it was required to prove actual fraud; and a distinction was somewhat vaguely drawn between *fraud in law* as in the case supposed, which might be compatible with innocent intentions, and *fraud in fact* which involved the actual intent to defraud. Fraud in law existed wherever a debtor conveyed any part of his property voluntarily, *i. e.*, without consideration. But as to fraud in fact, which it was necessary to establish, to entitle subsequent creditors to relief, it was held that this might be made out either by showing that the voluntary settlement had express reference to the contracting of the subsequent debts, or by showing such an indebtedness at the time of the settlement as to raise a presumption of fraudulent intent. The Supreme Court of the United States and other courts in the States reject Chancellor Kent's doctrine, and hold that the mere fact of indebtedness at the time of a voluntary settlement does not invalidate it, but that the indebtedness must appear to be so large as to make the withdrawal of the settled property from the debtor's resources, an embarrassment to the creditors. The latter views of the courts do not keep up the distinction between fraud in law and fraud in fact; but they hold the voluntary conveyance by a debtor, when it interferes with the security of existing creditors, as presumptively fraudulent, *in fact*, and in such case, subsequent creditors are allowed to impeach it. It is not a conclusive presumption of law, but it is sufficient to make out a case for either existing or sub-

sequent creditors, to show that the debtor was so embarrassed at the time of his voluntary settlement that it could not be made without prejudice to his creditors of that date.

These views will be found sustained in the following cases, among others: *Redfield vs. Buck*, 35 Com., 328; *Horn vs. Volcano Co.*, 13 Cal., 62; *Thompson vs. Dougherty*, 14 S. & R., 448; *Churchill vs. Wells*, 7 Coldwell, 364; *Hutchinson vs. Kelly*, 1 Robinson, 123; *Iley vs. Niswanger*, 1 McCord, 299; *Madden vs. Day*, 1 Bailey, 337; *Beach vs. White*, Walker Ch., 496; *Hurdt vs. Courtenay*, 4 Metc., 140; *Lowry vs. Lowry*, 2 Bush., 70; 1 Amer. Leading Cases, 41 *et seq.* As was plainly expressed in the case in 13 Cal., evidence of intent to defraud existing creditors is *prima facie* evidence of fraud against subsequent creditors. Once shown to have a fraudulent design, a party will not be listened to in the effort to qualify his own wrong, but it will be deemed to extend to all who may be affected by his conduct.

Under the rule sanctioned by these authorities, we have no doubt of the right of subsequent creditors to assail the conveyance in question in the light of the evidence already adverted to.

But, as has been already said, the presumption of fraud arising from a voluntary conveyance by one largely indebted, is not conclusive. It may be rebutted by showing that the existing debts were secured by mortgage, or were provided for in the settlement itself, or that they have since been fully paid off.

The defence in this case rely on the fact that all the indebtedness existing when the settlement of 1864 was made has since been paid off.

The fact of a payment of prior debts is only valuable as evidence on the question of intent to defraud, and there are circumstances under which it has no value in that direction. If, for example, a subsequent debt is created by borrowing money to pay a prior debt with, it is evident that the debtor has paid nothing; the new creditor has paid the old. The evidence against the debtor in favor of the old creditor has been removed at the expense of the new. It would be in-

equitable to allow the latter to be prejudiced by such a proceeding, and hence the courts say, in a general way, that the indebtedness, in such case, has not been paid, but transferred, and that the new creditor should be subrogated to the old.

It would not seem to make any difference, in such case, if the first subsequent creditor should, himself, be paid by another loan from a third creditor. The indebtedness would only be transferred one step further on.

Nor would it seem to make any difference in principle, if the debtor, instead of borrowing money from the new creditor and directly applying it to the payment of the old debt, should purchase goods on credit, and out of the proceeds, which ought to be applied to pay their price, discharge his old debt.

That very case is covered by the language of the court in *Savage vs. Murphy*, 34 N. Y., 508, in which it is recited that the debtor continued in business, making use of the avails of each successive purchase to pay off his debts.

In short, when a debtor, by paying off an antecedent debt, does not lessen his indebtedness, but continues indebted all the time, and only relieves that condition in one direction by increasing it in another, the case is treated as if the prior indebtedness had continued throughout. See, on this subject, *Madden vs. Day*, *supra*; *Savage vs. Murphy*, *supra*; and *McElwee vs. Sulton*, 2 Bailey (S. C.), 128; *Paulk vs. Cooke*, 39 Conn., 566.

In this case it appears that Entwisle and Barron were partners in the business of building. All their debts represented by this assignee were incurred in that business, and are for materials purchased and labor employed. All the money they received was in payment for those materials and that labor, and their own personal labor. That money was the only fund to which their creditors could look for payment, for the partners had no tangible property. But it was that very fund out of which Entwisle paid his old creditors. Every dollar so paid to these was so much taken from the creditors who are still unpaid. It would seem strange that payment thus made, at their expense, should deprive them

of their equities founded on the indebtedness so discharged ; and such, we think, is not the doctrine of the courts. We, therefore, think the assignee entitled to assail the settlement of 1864, on the ground of the indebtedness of Entwisle at that date.

If that settlement be void, it would follow that if the later acquisitions were, as contended for the defense, the mere fruit and outgrowth of that, they must share the same fate.

Still more clearly must this be the case if they are to be treated as so many new voluntary donations, as the two latest ones post-dated the creation of some of the present indebtedness.

Whether the later conveyances were additional gifts of Entwisle to his wife, and whether the sums of money advanced by him for repairs, taxes and interest on encumbrances, exceeding \$5,000 in amount, are to be considered as additional gifts, making a part of the property ; or these, on the other hand, are to be considered reimbursed to the firm by the sum of \$8,000 received from the proceeds of the sale to Phillips, are questions of fact which the conclusions already announced render it unnecessary to examine at length. The burden of proving the expenditures to have come from her separate estate is clearly upon the wife, according to the ruling of the Supreme Court in *Seitz vs. Mitchell*. Against her claim we have the improbability that the first investment would have more than doubled itself in nine or ten years, over and above all expenses ; the fact that a part of the means employed was derived from the sale of furniture owned by the husband, and from the wife's own labor in keeping a boarding house, which labor was the legal property of the husband ; and the absence of any definite proof ascertaining exactly what proportion was strictly revenue from the property first settled upon her, which would be most material if that were considered free from the attacks of creditors. And in addition to these features, is the important one, conspicuous through the whole history, that just as the firm became more and more involved, the property of Mrs. Entwisle grew in bulk. If we were called upon

to decide whether the subsequent purchases were the product of the first, we should feel that the defendants had failed satisfactorily to establish it.

There are other features in the case to be considered.

One may hinder, delay and defraud his creditors in either of two ways, viz., either by really giving away property which ought to be consecrated to their protection, or by seeming to do so while really retaining the beneficial ownership himself. If Entwisle had had these pieces of property conveyed to another person than his wife—to a mere friend for example—and it appeared to the court that, notwithstanding the apparent record title in the donee, Entwisle had continued all the time to pay the taxes and repairs and interest on encumbrances, had raised money on it for his own use by deeds of trust, and had applied the largest part of the proceeds of a part of it, \$8,000, to his own use, such facts would be absolutely conclusive evidence to any court that he had remained all the time the real owner, and that the conveyances were a mere cover to protect the property from creditors. Does it make a difference that the donee is the debtor's wife? It is true that a wife, more than any other gratuitous donee, might be expected to relinquish the subject of the gift, or allow the husband to use it, from time to time, according to the exigencies of his affairs; but, still, the difference seems to me to be only a difference of degree in the force of evidence such facts supply, as to the continued ownership of the donor, and it does not seem to me that even a wife can allow to her husband the control and beneficial use of property previously settled on her by him, to the extent disclosed in this case, except at the risk of having it declared by the courts to be his property and answerable for his debts.

It is objected that the averments of the bill are not such as to justify the relief claimed in argument, on the general grounds we have before indicated.

We find it distinctly averred in the bill that the several conveyances to or in trust for Mr. Entwistle were made by his procurement and for considerations paid by him out

of his own means or those of the firm, at times when he was largely indebted; and that they were made with intent to evade the payment of his debts, existing at the times of the several conveyances, and, generally, with intent to hinder, delay and defraud his creditors of their right to satisfaction out of his property, and that at the dates of the several conveyances, and before and after them, he was indebted to a large number of persons, including those named in the bankruptcy schedule. Assuming these averments to be proved, a case is made out which, according to the views we have enunciated, entitles either prior or subsequent creditors to relief.

We have thought the averments of the bill sustained by the proofs, at least so far as the legal presumptions of fraud are sufficient for that purpose, and are unable to see any discrepancy between the *allegata* and *probata*.

It is true that it was shown in evidence and relied on in argument, that the antecedent debts had been paid. And it was answered to this, both on the evidence and argument, that they were paid by creating new indebtedness. And it seemed to be intimated in argument that this latter feature of the case was an essential part of the complainant's case and ought to be set forth in his pleadings.

It seems to us sufficient for the complainant to state the *prima facie* case which entitles him to relief. The fact of payment of the prior indebtedness, which might be an answer to that case, was matter of defence. The complainant was not bound to anticipate and forestall it. If the defendants had averred the fact in their answers, the complainant could only have met it in evidence. But in truth, as already intimated, this fact of payment of prior debts is only *evidence* on the general question of fraudulent intent, and if so, neither that nor the countervailing and responsive evidence need be made the subject of special averment by either party.

Our conclusion is, that the decree of the court below be reversed, and the cause be remanded with directions to enter a decree directing a sale of the property described in the proceedings for the payment of the debts.

Mr. Chief-Justice CARTER :

While concurring in the opinion so ably elaborated by my brother, I wish to add an additional view of this case, which, it seems to me, more emphatically justifies our conclusion.

If a fraud in law or in fact was perpetrated in this case, it was perpetrated against the rights of the creditors of Entwisle & Barron, for it appears that it was the money of this firm that was drawn into contribution to acquire the property in question. Entwisle had failed. He was largely broken up at the date of the inception of the copartnership between himself and Barron. He never did satisfy the whole of the indebtedness then owed by him, although, be it said to his personal credit, that he endeavored to do it—for that is manifest—but his will was much larger than his ability. A large portion of that antecedent indebtedness became barred by limitations, and all of it that ever was paid was paid out of the substance of Entwisle & Barron, and through the material and credit that they had derived from the creditors of Entwisle & Barron. So we have superadded to the ordinary case of a debtor, transferring his property or making a gratuity of it in the presence of indebtedness, the fact of his transferring substance derived from the creditors of the new firm to his individual credit. Now, he has no right to do that without the sanction of the parties. He had no right to gratify his individual debtor by the transfer of the substance of Entwisle & Barron. That transfer is void as against the creditors of the firm. They have an equitable lien upon the substance that they part with upon the credit of the firm, and have the highest right that equity can create to be reimbursed out of it.

Here the creditors of Entwisle & Barron are made to pay contribution to the individual creditors of Entwisle, of a period antecedent to the partnership.

Now, if the property of these creditors of the firm can be traced into that channel they ought to have the right to recover it.

But we have another feature in this case. Entwisle not

only perverted the substance of Entwisle & Barron to the use and benefit of his individual creditors, but he started out on another enterprise, and that was *giving it away* to his wife.

Now, if a co-partner has not the power to appropriate to his individual indebtedness the assets of a firm without the consent of the co-partner, has he a right to *give* it away without his consent? You have a man giving away what does not belong to him, and without the moral excuse of using it to pay his debts. So this voluntary gift to a wife of co-partnership property, derived from co-partnership creditors, has the vice of giving away what the donor has no title to.

The creditors here never were the creditors of Entwisle, but the creditors of Entwisle & Barron. And we have in this case the feature of the creditors of such a firm wrested of their substance for the gratification of a gratuity of one of the co-partners.

Now, these views strengthen very much, in my judgment, the ground so ably elaborated by my brother, and although thoroughly in accord with the opinion just delivered, I think that this additional view of the case is the strongest feature in it, and is unanswerable. Entwisle had no power to give away this property. It was in fraud of his partner and in fraud of the creditors of the firm, and, as I understand it, equity will denounce the gift as void.

Of course I make these remarks with the utmost respect for the chief party in the defence, for I regard him, personally, highly; but he has certainly made a great mistake here.

ANDREW MELVILLE vs. THE BALTIMORE & POTOMAC R. R. CO.

LAW. NO. 20,729.

{ Decided October 23, 1887.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. A demurrer to a declaration in an action for breach of contract will be sustained when the contract declared upon is a contract between the plaintiff and a third party, and there is no averment showing the relation of the defendant to that party, nor to the contract.
2. A verbal contract cannot be received in evidence to alter a written one.

THE CASE is stated in the opinion.

WM. A. COOK and H. B. MOULTON for plaintiff.

ENOCH TOTTEN for defendant.

Mr. Justice COX delivered the opinion of the Court :

This is an action for damages against the Baltimore & Potomac R. R. Co. for carrying the plaintiff all the way to Alexandria, and not permitting him to get off at Fort Runyon, a way station between this city and Alexandria.

The declaration was demurred to below and the demurrer sustained. Although by proper amendment a case might be made out, the case in its present form, we think was open to demurrer.

There are three counts in the declaration, the first and second being substantially identical. The first count of the declaration states that "the said defendant, being a common carrier of passengers, undertook and agreed to and with the said plaintiff heretofore, to wit, on or about the — day of November, A. D. 1878, to carry him, the said plaintiff, from the city Washington, D. C., to a station known as 'Fort Runyon Station,' located in the State of Virginia ; and that for the purpose of securing to the plaintiff the right to be conveyed to said station, the said defendant, the Baltimore and Potomac Railroad, through its duly authorized agent at the ticket office of said company in their said passenger depot, on the corner of Sixth and B streets northwest, Washington, D. C., sold to the plaintiff, a ticket of which plaintiff's Exhibit A. M., No. 1, is a copy." When we turn to that exhibit, we find

that it is a ticket of the Alexandria and Washington Railroad Co., a twenty-five cent trip family ticket. This ticket is as follows: "This ticket and each coupon attached thereto will entitle A. Melville, or a member of his immediate family, or servant in the family, to one continuous passage in the care of the Alexandria and Washington Railroad Company, between Washington and Alexandria, upon the conditions named in the within contract, which must be signed before passage can be obtained." One condition is that the ticket shall not be transferable, and the fourth condition is "That the holder will not stop off between the points named" in the ticket. The fifth condition is, "that passage shall be taken only on such trains as stop at the station named in this ticket;" that is Alexandria. And this is signed by Melville himself, so that the written or printed ticket was a contract of the Alexandria and Washington Railroad Co., not of the Baltimore and Potomac Railroad Co., to carry the plaintiff all the way to Alexandria with the express condition that he shall stop off nowhere else. But the plaintiff then proceeds to state: "That upon the face of said ticket it was an undertaking to furnish the plaintiff suitable passage and conveyance as far as the city of Alexandria, but it was expressly understood and agreed by and between the plaintiff and the defendant that the said defendant would stop its trains at the said Fort Runyon station, the same being an intermediate station between this city and the city of Alexandria, in the State of Virginia, and afford the plaintiff an opportunity to get off thereat."

Now, in the first place, the contract that is exhibited was a contract between the plaintiff and the Alexandria and Washington Railroad Co. The declaration does not contain any averment showing the relation of the Baltimore and Potomac Railroad Co. with the Alexandria and Washington Railroad Co. otherwise than what we can infer from the averment that the Baltimore and Potomac Railroad Co. sold this ticket to the plaintiff. As far as the declaration goes we cannot see any connection between the two rail-

roads except from the circumstance that one road sold the other company's ticket, and the only inference is that it sold it as the agent of the other railroad company, which is a common practice, one company selling coupon tickets running through a whole series of railroads.

And the same thing may be said of the express understanding or agreement which operated to modify the terms of this contract. There is nothing indicated showing why any such contract was made by the Baltimore and Potomac Railroad Co., or that they made it as agent.

The sum of it is, then, that the plaintiff avers a written contract, signed by himself, with the Washington and Alexandria Railroad Company to the effect that it would transport him to Alexandria over the Alexandria and Washington Railroad, and, at the same time, a *verbal* contract in direct contradiction of it that he might stop at Runyon station. Now, whether these are to be considered as two contracts of the Baltimore and Potomac Railroad Co., or two contracts of the Alexandria and Washington Railroad Co., it is impossible to ascertain from the declaration or from the contract itself. It is evident that the plaintiff could not, at the trial, offer the verbal contract in evidence to alter the written one, and, therefore, he states a case which would not entitle him to recover. For this reason we think the demurrer was rightly taken and properly sustained by the court below; although it is possible that amendments might be made to the declaration. The third count does not allege any cause of action and need not be noticed.

Judgment affirmed with leave to amend.

BENJAMIN U. KEYSER vs. ALEXANDER R. SHEPHERD.

AT LAW. No. 19,836.

{ Decided October 30, 1883.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. Although during the pendency of a suit brought upon a promissory note endorsed in blank the plaintiff transfer it by delivery, he may still maintain the action if it be agreed between him and the transferee that notwithstanding the delivery the legal title shall be considered as still remaining in the plaintiff for the purpose of prosecuting the suit.
 2. The holder of a promissory note endorsed in blank transferred it by delivery pending a suit brought by him upon it, his attorney filing an order in the cause for the entry of the suit to the use of the transferee, which was done. On the trial the defendant contended that plaintiff had parted with his title and could not maintain the action.
- Held*, That the order of the attorney was to be presumed as authorized by plaintiff, and that this order was equivalent to an agreement that the suit should be prosecuted for the benefit of the assignee of the note, the legal title to remain in the nominal plaintiff as far as necessary for that purpose, and that under such circumstances the suit could be maintained.

STATEMENT OF THE CASE.

ASSUMPSIT by plaintiff as endorsee of a promissory note.
The note was as follows :

“\$725.50.

WASHINGTON, D. C., Oct. 16th, 1874.

“Three years after date I promise to pay to the order of Frank Hume, seven hundred and twenty-five dollars and fifty cents, with interest at the rate of six per cent. per annum, reserving the option of paying the same, with accrued interest at any time before maturity.

“ALEX. R. SHEPHERD.”

Endorsed : “Pay to the order of Benjamin U. Keyser.

“FRANK HUME.”

The suit was commenced August 2, 1878, but on the 27th of November, 1880, an amended declaration was filed, and at the same time an order by plaintiff's attorney to enter the suit to the use of William Birney.

Under the general issue, the plaintiff, on the trial, proved the signature of the note and the endorsement, and rested. Whereupon defendant called the plaintiff, Benjamin U. Keyser, who testified that he was the owner of the note when the suit was instituted, but that, afterwards and before the

filing of the amended declaration, he parted with all his interest in it by transferring the same endorsed in blank by defendant Frank Hume, and was not at the time of testifying in any wise interested therein; witness had no recollection of having authorized the suit to be carried on in the name of the transferee. The defendant then rested.

Whereupon the defendant moved the court to instruct the jury that if they believed the testimony of the said Keyser, and should find that plaintiff had parted with his interest in said note since the institution of this action, by delivering the same with the blank endorsement of Frank Hume thereon, the verdict must be for the defendant. And the justice presiding gave to the jury the said instruction, the plaintiff excepting thereto.

Verdict for the defendant.

BIRNEY & BIRNEY for plaintiff cited :

2 H. & J., 328; 25 Wend., 411; 15 Wend., 640; 1 Morris (Iowa), 12; 1 Harr. (Del.), 363; 14 Pa. St., 469.

A. C. BRADLEY and W. F. MATTINGLY for defendant :

The plaintiff parted with his legal and equitable title and interest in the notes by the transfer, and the action could no longer be maintained. 2 Pars. on Notes and Bills, 454; Lee *vs.* Jilson, 9 Conn., 94; Curtis *vs.* Bemis, 26 Conn., 1; Allen *vs.* Newberry, 8 Iowa, 65; Hall *vs.* Gentry, 1 A. K. Mar., 555; Thatcher *vs.* Winslow, 1 Gill & J., 175; 4 Cush., 32; 9 Dana, 415; 8 Exch., 883.

Mr. Justice Cox delivered the opinion of the court.

This is an action by plaintiff as endorsee of a promissory note given by Alexander R. Shepherd to Frank Hume, and by him endorsed in blank. While the note was in the possession of Keyser thus endorsed, Keyser instituted a suit upon it, and, pending the action, he transferred the note to William Birney and passed the title by delivery without further endorsement. At the trial of the case on the general issue, the defendant relied upon this fact, and asked an

instruction of the court to the effect that, if the jury believed the testimony of Keyser and should find that the plaintiff had parted with his interest in said note since the institution of this action, by delivering the same with the blank endorsement of Frank Hume thereon, the verdict must be for the defendant; and the justice presiding below gave this instruction to the jury, and the verdict was for the defendant. Exceptions were taken, and the question comes before us here in its present form.

The defence rests upon the proposition, which is generally true, that where a party has a cause of action, if he parts with it after the suit has been commenced, his right to continue the action is at an end. The only question is, whether this principle is applicable to this elastic form of contract known as commercial paper. On this question the authorities are widely divergent. Cases in the State of Maryland have been cited on both sides, but in our judgment none of them apply here. In one case it appeared that the plaintiff had endorsed the note in blank, and that was relied upon as evidence that he had passed the title away, but there had been no delivery of the note, and it was held that without that or some action equivalent, the title was not changed. On the other side, the defendant cited a case in which it appeared that the plaintiff had endorsed the note in full to somebody else. Now, an endorsement in full passes the title, and, therefore, the defendant showed himself out of court as soon as he produced the instrument. On the other hand, certain cases are cited from the Connecticut Reports, and one from 8 Exch., 884, which do unquestionably sustain the defence. They say that when a man transfers a note payable to bearer, or endorsed in blank, pending a suit, he has parted with his cause of action. But, again, cases are cited from the New York, Pennsylvania, Delaware and Iowa Reports, which sustain the position of the plaintiff to this extent—they say, generally, that a man who holds in his possession paper payable to bearer, or endorsed in blank, may institute suit in the name of anybody he pleases. Of course at the trial he will have to fill

up the blank endorsement with the name of the nominal plaintiff, and they hold, generally, that the plaintiff may, if he chooses, consider himself a *cestui que use*, and it is of no consequence to the defendant who brings the suit if the note is filed and cancelled in full by judgment rendered upon it, that is full protection to him. Now, without deciding the general question, there is this to be remarked. It is undoubtedly true that the mere transfer by the owner of a note endorsed in blank passes the legal title; but we think it is within the power of the parties, by convention, to qualify the effect of that act. If I sell a specific chattel, the title is passed by sale alone, and still more by delivery; but it is perfectly well settled that in such a case I may agree with the purchaser that the legal title shall not be considered to have passed until the price is paid. Instances of that kind are common in the books, and I have no doubt that in such a case an action of replevin could be brought and maintained by the seller against a third party unless such third party had been deceived by the apparent ownership of the one from whom he bought the chattel. So with a promissory note, when the holder chooses to part with it during the pendency of a suit, I think it may be agreed between him and the assignee that, although delivery takes place, the legal title shall be considered as still remaining in the original holder for the purpose of prosecuting suit. Is there any evidence of such an agreement in this case? Keyser testifies unequivocally that he parted with all his beneficial interest in the paper, and that he did actually deliver it to William Birney, and that he has no recollection of ordering the suit to be continued for Birney's use; but we find on record an order for the entry of the suit to the use of Birney by the attorney of the nominal plaintiff, Keyser, and this we may presume was authorized by the principal. He does not deny that he authorized it; he merely says that he has no recollection of having done so. We take it that this was an authorized entry by the attorney, and that it is equivalent to an agreement that the suit should be prosecuted for the benefit of the assignee of the note, and that the legal title

should still remain in the nominal plaintiff as far as necessary for that purpose; and under these circumstances we think that the suit could still be maintained, and that the judge below was wrong in directing a verdict for the defendant.

The CHIEF JUSTICE, while concurring, said that he regarded the decision of the court as confined to the special circumstances of the case.

THE MASONIC MUTUAL RELIEF ASSOCIATION

vs.

MARY MCAULEY ET AL

EQUITY. No. 7,924.

{ Decided October 30, 1883.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

R., at the time of his death, was a member in good standing of an association in the nature of a life insurance company whose object was, as declared by the charter and by-laws, "to provide and maintain a fund for the benefit of the widow, orphan, heir, assignee or legatee of a deceased member." By a provision of one of the by-laws if a deceased member had no *legal representatives* the money they would have been entitled to was to become the property of the association. Another by-law provided that "no change of beneficiary can be made or recognized until submitted to and approved by the board of directors." R. had joined the society in the lifetime of his first wife, and named her as the beneficiary. She dying, he married again, and died intestate, without having notified the association of any change of beneficiary. Whereupon three separate claims were made to the fund. First, by the representatives of the first wife; second, by the representatives of the husband; third, by the surviving widow.

Held, 1. That the language used by the husband in designating his first wife as the beneficiary must be interpreted as meaning only in case she survived him, and as she did not, her representatives were not entitled.

2. That the term "legal representatives" in the clause providing "that where the deceased member has no *legal representatives* the money shall become the property of the association," is to be taken as meaning those who are legal representatives in the contemplation of the charter and by laws, to wit, the people there enumerated "the widow, orphans, heir or legatee," &c.

3. That in the absence of any direction by the deceased, the order in which the parties to be benefited are named in the charter and by-laws is the order in which they are entitled to the fund, viz., the widow; if no widow, then the orphan; if none, then the heir, &c.; and therefore the widow was entitled to the fund in this case.

STATEMENT OF THE CASE.

BILL OF INTERPLEADER certified to be heard in General Term in the first instance.

The complainant was incorporated by acts of Congress approved March 3, 1869, and March 3, 1875. By the second section of the former act "the particular business and objects of such society or corporation shall be to provide and maintain a fund for the benefit of the widow, orphan, heir, assignee or legatee of a deceased member immediately upon proof of such death." Section 4 authorizes the enactment of such by-laws, rules and regulations as the board of directors may deem necessary for the management of the effects of the corporation. In the by-laws it was provided that—

"On the death of a member each surviving member becomes indebted to the association in the sum of \$1.10."

"On the death of a member of the association, if he has responded within the prescribed period to all assessments made on him, his widow, orphans, heir, assignees or legatee shall be entitled to receive as many dollars as there are members in the association at the time of death."

"If a member has no legal representative, such sum of money as they would have been entitled to, shall become the property of the association."

"No change of beneficiary can be made or recognized until submitted to and approved by the board of directors."

On the 23d of February, 1874, one William Reed became a member of the association upon an application containing the following clause:

"In the event of his death he directs that all benefits arising from his connection with the association be paid to my wife, Ann Reed, unless he shall otherwise order and give to the secretary of the association ten days notice of his desire."

Ann Reed, dying, the insured married Sarah Auna Reed, and some time afterwards died intestate without children, leaving his second wife surviving him, and James Reed and Sarah Buchanan his only heirs-at-law. *The deceased,*

after the death of his first wife, had never notified the association of any change of beneficiary.

Upon his death, the defendants, Mary McAuley and Margaret Woods, claimed the fund due from the association (\$1,632) as the representatives of the first wife. The defendants, James Reed and Sarah Buchanan, claimed it as the representatives of the decedent, while the second wife, Sarah Anna Reed, interposed a claim to it as his widow. Whereupon the association filed this bill of interpleader making these parties defendants that they might establish their several claims to the fund.

R. ROSS PERRY and WALTER S. PERRY for the representatives of the first wife :

It is apparent that the corporation in question is an insurance company and is engaged in insurance business. *May on Ins.*, (2 ed.), §550 *a* ; *Commonwealth vs. Wetherbee*, 105 Mass., 149, 160 ; *State, ex rel., vs. Citizens Benefit Association*, 6 Mo. Appls., 163, 164 ; *State, ex rel., vs. Merchants' Exchange Mut. Ben. Ass.*, 72 Mo., 147, 149, 151, 158 *et seq.*

No particular form is requisite for such a contract. It may be without a policy, it may be by parol. *Bliss' Life Ins.* (2d ed.), § 136 ; *Trustees, &c., vs. Brooklyn Fire Ins. Co.*, 19 N. Y., 305, 307-9 ; *Ellis vs. Albany City Fire Ins. Co.*, 50 N. Y., 402, 405 ; *Relief Fire Ins. Co. vs. Shaw*, 94 U. S., 574 *et seq.* ; 21 Am. L. Reg., 37 *et seq.*

Neither the insured, during his life, nor his next of kin or personal representatives, after his death, can have any claim to the insurance money where the policy is expressed to be for some one else. *Bliss' Life Ins.* (2d ed.), §§ 317, 318.

Where the policy designates a person to whom the insurance money is to be paid, the person who procures the insurance, and who continues to pay the premiums, has no authority by will or deed to change the designation or title to the moneys. He is under no obligation to continue to pay the premiums, unless he has covenanted so to do, but if he does so, the person originally designated in the policy will derive the benefit. The change of designation can be made

only by the person originally designated, and, therefore, all such persons must concur in the change. Bliss' Life Ins., § 337. And see May on Ins., (2d ed.), § 392 ; Ky. Mas. Mut. Life Ins. Co. *vs.* Miller's Adm'r, 13 Bush, 489, 491, 493 ; Gosling *vs.* Caldwell, 7 Reporter (Tenn.), 410 ; Robinson *vs.* Duvall, 12 Reporter (Ky.), 466 ; Ricker *vs.* Charter Oak L. Ins. Co., 27 Minn., 193 *et seq.*; Ballou *vs.* Gill, Adm'r, 50 Wis., 614-618 ; Hodge's Appeal, 12 Chicago L. News, 421 ; Allis *vs.* Ware, 9 N. W. Rep., 668 ; Brockhaus *vs.* Kenna, 12 Reporter, 168-9 ; McClure, Ex'r, *vs.* Johnson, 10 N. W. Rep., 217 ; Worley *vs.* N. W. Masonic Aid Ass., 13 Reporter, 288.

It is true that the contract in this case is different from the ordinary contract of life insurance, in so far as it gives the assured the power of changing the beneficiary. But the insured has neverthe . . . interest in the "benefits." He has only a *power* to appoint the person who is to receive them, and he must exercise that power in the manner prescribed by the by-laws of the corporation. His failure to exercise it leaves the contract on the same footing as a contract of life insurance in the usual or more common form. Maryland Mut. Ben. Society, &c., *vs.* Clendennin, 44 Md., 429, 443 ; Arthur et al. *vs.* Odd Fellows' Ben. Ass., &c., 27 Ohio St., 557-560 ; Duval *vs.* Goodson, 9 Ins. L. J., 901-904 ; Ky. Mas. Mut. L. Ins. Co. *vs.* Miller's Adm'r, 13 Bush, 494 ; Folmer's Appeal, 87 Penn. St., 133-135.

If Ann Reed, whom the defendants McAuley and Woods now represent, were now living as the *divorced* wife of William Reed, she would unquestionably be entitled to the fund in dispute. Conn. Mut. L. Ins. Co., *vs.* Schaeffer, 94 U. S., 467-462.

It is equally clear that whatever rights Ann Reed had in the matter passed, at her death, to her personal representatives.

SAMUEL C. MILLS, B. T. HANLEY and J. J. DARLINGTON
for the representatives of the deceased :

The direction in favor of the wife contained in the appli-

cation for membership, viz., that *in the event of the husband's death*, the fund be paid to her, should be construed to mean, in the event of his death leaving her surviving him. "In the event" implies *contingency*; the death of the husband at some time or other was certain. The contingency was his death before hers. This unquestionably was the intention.

But even where the husband has a policy issued to his wife, payable to *her, her executors or administrators*, if she dies in his lifetime, and he keeps up the policy by the payment of premiums, the decided weight of authority is that his representatives, not hers, are entitled to the insurance money. See *Kerman vs. Howard*, Adm'r, 23 Wise, 108; *Moehring vs. Mitchell*, 1 Barb. Ch., 264; *Mut. Ben. Life Ins. Co. vs. Atwoods*, Adm'r, 24 Grattan, 497; *Eadie vs. Slimmon*, 26 N. Y., 9; *Gambo vs. Covenant Mut. L. Ins. Co.*, 50 Mo., 44. We have found no cases in conflict with the foregoing, except where there were statutory provisions controlling the decisions; we have no statutes upon the subject here.

If the title to the fund passed absolutely to the first wife as is claimed, it was a mere chose in action, which, doubtless, devolved upon the husband, under the Maryland act of 1798, immediately upon her death. That act, it is true, requires that the husband shall in his lifetime reduce the chose in action into his possession; but in the case at bar the husband had, at the time of his death, all the possession that the nature of the chose in action in question admitted of. And see *Moehring vs. Mitchell*, 1 Barb. Ch., 274; *Dutson*, Adm'r, *vs. Merrifield*, Adm'r, 57 Ind., 25. The unmistakable intent of the husband, and the rules of law alike, exclude, therefore, the claims of the representatives of the first wife.

The claim of the widow rests upon the fact that the "widow" is the first of the classes of persons named, to provide a fund for whom is declared to be the business and object of the association; but the construction that the order in which the beneficiaries contemplated in the organization of the association are named in the order of distribution,

would involve both absurdity and injustice, for under that construction, neither a legatee, nor an assignee for value, would take if the deceased member left any heir, no matter how remote. It is a well-settled principle of construction, that the ordinary rules of descent and distribution shall prevail, unless the contrary intent be apparent.

The charter prescribes neither any order of distribution, nor any reversion to the association, but expressly provides that the directors shall have full power to make and prescribe such by-laws, rules and regulations as they shall deem needful and proper, for the disposition of the funds of the society not contrary to the charter or to the laws of the United States, and the directors in the exercise of this power, have provided that, *in the absence of legal representatives*, and not otherwise, the fund shall become the property of the association. Under such a charter and by-laws, the contract between the member and the association differs in no material respect from the ordinary contract of insurance; and the member unquestionably has a property in the fund, which upon his death, and in the absence of a contrary direction by him, devolves upon his legal representatives or next of kin. It will be seen that we do not claim the *entire* beneficial interest in the fund to the exclusion of the widow. We simply claim that the designation of a beneficiary made by the decedent failed, because of the death of that beneficiary in his own lifetime, and that he, having made no new designation, there is nothing in the constitution or by-laws of the association to vary the usual order of distribution. There being no children one-half of the fund should go to the widow, and the other half to the brother and sister of decedent.

C. M. MATTHEWS for the widow of deceased :

This corporation possessed only such qualities as were best calculated to further the objects of its creation. Dartmouth College *vs.* Woodward, 4 Wheat., 636; Torrey *vs.* Baker, 1 Allen, 122.

The object of the association was not to provide a fund for

the benefit of a member, but "for the benefit of the widow, orphan, heir, assignee, or legatee of a deceased member." The member in this case had but a power of appointment over "the benefits arising from his connection with the association," this power to be exercised or not at the discretion of the member, and when exercised to conform as to the mode of execution to the provision of the charter and by-laws. *Arthur vs. Association*, 29 Ohio St., 561; *Society vs. Clendennin*, 44 Md., 430; *Life Ins. Co. vs. Miller*, 13 Bush, 494.

No quality of inheritance attaches to this interest as a member of the association, the benefits not constituting assets of the deceased member, or liable to administration or the statute regulating the distribution of the estate of an intestate. 2 *Chance on Powers*, 1820; *Farwell on Powers*, 190; *Blogge vs. Wilson*, 1 Story C. C., 442; *Society vs. Clendennin*, 44 Md., 430; *Arthur vs. Association*. 29 Ohio St., 561; *Ballou vs. Gill*, 50 Wisc., 617; *Dietret vs. Association*, 45 Wisc., 82; *Folmer's Appeal*, 87 Penna. St., 137; *Hodge's Appeal*, 12 Chic. Leg. News, 421 (Aug. 21, 1880); *Duvall vs. Goodwin*, 9 Ind. L. Jour., 901.

In the case at bar the member exercised this power in favor of his former wife, Ann Reed, which disposition being ambulatory and liable to be revoked by the member, and vesting the benefits in the appointee only at the death of the donee, lapsed by the death of Ann Reed before her husband, William Reed. *In re Davies*, 13 Eq., 163; *Oke vs. Heath*, 1 Vesey, 135; *Easum vs. Appleford*, 5 M. & C., 56; *Lord Godolphin's Case*, 2 Vesey, 78; *Jeafferson's Case*, 2 Eq., 276; *Wilkinson vs. Schneider*, 9 Eq., 423; *Vandergree vs. Aclam*, 4 Ves., Jr., 771; *Harries Case*, Johns., 199; *Larkin vs. Larkin*, 34 B., 443; *Burgess vs. Mowbry*, 10 Ves., Jr., 319.

Neither the heirs of Ann Reed nor of William Reed can, therefore, take.

The effect of the disjunctive "or," used in the charter and the by-laws, is to separate from each other the various classes of beneficiaries named, so as to provide for the

"widow," or "orphans" or "heir." Each class will take in the order named, and no class will take except the preceding class or classes shall have failed.

The widow is therefore entitled to the fund.

Mr. Justice Cox delivered the opinion of the court.

This association was incorporated by an act of Congress, which declares that "the particular business and objects of such society or corporation shall be to provide and maintain a fund for the benefit of the widow, orphan, heir, assignee or legatee of a deceased member, immediately upon proof of such death." One section of the act authorizes the enactment of such by-laws and rules as may seem proper to the association, for the disposition and management of the funds, property and effects of the corporation, in accordance with the provisions of the charter. The only fund that the society have to dispose of is a contribution, payable on the death of a member, of one dollar from each surviving member. In this case the fund to be disposed of is \$1,632. The by-laws provide that, "on the death of a member of this association, if he has responded within the prescribed period to all assessments made on him, his widow, orphan, heir, assignee or legatee, shall be entitled to receive as many dollars as there are members in the association at the time of death." Another article provides that "if a member has no legal representatives, such sum of money as they would have been entitled to shall become the property of the association after deducting therefrom the funeral expenses, if required, which shall not exceed the amount the legal representatives, if any, would have been entitled to;" and, by another article, it is provided that "no change of beneficiary can be made or recognized until submitted to and approved by the board of directors."

There is no express provision, but it is a right recognized by the practice of the association, that anybody becoming a member may designate the beneficiary, who shall receive the fund payable after his death. When William Reed filed his petition seeking admission as a member, in February,

1874, he directed that, "in the event of my death, all benefits arising from my connection with the association shall be paid to my wife, Ann Reed, unless I shall otherwise order and give the secretary of the association ten days' notice of my desire." Reed was admitted as a member. Afterwards his wife died. He married a second time, and afterwards he died; and now this controversy arises over the fund payable upon his death. It is a three-sided controversy and it has been argued very creditably on all sides.

The fund is claimed, first, by the administrators of the first wife; second, by the administrators of the husband; and thirdly, by the widow surviving.

In behalf of the first claim it is urged that this benevolent association was virtually a life insurance company; that these provisions in the charter and by-laws make this virtually an insurance on the life of the husband for the benefit of his wife; that as such, it is a part of her personal property—a chose in action—and that after her death it passes, by the common law, to the husband, but, under a statute of Maryland, unless it be reduced to possession by the husband in his lifetime, it goes back to the personal representatives of the wife, and there was no such reduction to possession in this case, in the lifetime of the husband. He might have reduced it to possession by assigning it to somebody else, but he did not.

In opposition to this view, it is claimed that, treating the transaction strictly as an insurance on the husband's life for the benefit of the wife, still, after her death, according to the weight of authority, it passes to him and he has a right to dispose of it as he pleases, and at his death it passes to his general estate. Without undertaking to decide this controverted question of law, it will be sufficient to remark that in this case the question at issue is controlled by the particular language of the designation made by the husband. He had the power to designate the beneficiary, and he had a right to do so either absolutely or conditionally, and the direction given by him was that, in the event of his death, all benefits arising from his connection with the association should be

paid to his wife Ann Reed. Now, it is obvious that this direction cannot be literally gratified unless the wife survive the husband, and the whole language of the husband on this point is that of contingency or condition. He was looking forward to this provision for the benefit of his wife in case she should survive him—that is, in that contingency. His own death was not, of course, contingent; it was an event certain to occur; but it might be regarded as contingent with reference to some other event—the death of his wife, for instance—and we think the fair interpretation of the language of the husband is that, in case of his dying *before his wife*, the benefits arising under this transaction were to enure to her, but not otherwise. To construe it otherwise would be to hold that the design of the husband in making this provision, was that its benefits should go first, to the wife, if she survived, but otherwise to her relations; and it is not to be supposed that this association was organized and sustained by its members for the purpose of benefiting the relations of their widows. We think, therefore, the meaning of the language used by the husband in designating the beneficiary was that the benefits of this provision were to go to his wife only in case she survived him; and as she did not survive her husband, the provision falls to the ground so far as she is concerned, and the claims of her representatives are out of the question.

The controversy remains, then, between the personal representatives or administrators of the husband and the surviving widow. In behalf of the former, the same general ground already stated is taken, namely, that this is virtually an insurance on the husband's life and as such would pass to his estate. In some respects it is like a life insurance and in other respects it is different. It was not designated to provide for the creditors of the husband or for those generally interested in his estate; but for his widow, orphans or immediate heirs; and, therefore, the charter provides for "the immediate payment to the widow, orphans, heir, assignee or legatee of a deceased member, of as many dollars as there are members in good standing on the books of the corpora-

tion." The charter and the by-laws control the destination of this fund, and they explicitly provide that in the condition of affairs which this case presents, the widow, orphans, heir, assignee or legatee shall be entitled to receive it. An argument is based on the language of article V, section 5, which provides that where the deceased member has no *legal representative*, the money shall become the property of the association. From this provision it is argued that if there are legal representatives of the deceased, they must be entitled to the fund. This argument, if it proved anything, would prove too much. It would prove that in a case where there were no legal representatives, notwithstanding the existence of a widow, or an orphan, or heir, the money must go back into the general fund of the association to the direct frustration of the whole scheme and object of the association and in disregard of the express language of its charter and by-laws. We think, therefore, that the term "legal representatives" here means those who are legal representatives *in the contemplation of this charter and these by-laws*, namely, the very people who are there enumerated, "the widow, orphans, heir or legatee." The fund is to go to some one of these parties. They are mentioned disjunctively; the money is to be paid to the widow, *or* the orphans, *or* the heir, *or* the assignee or legatee. Now, that means one of two things, either that it shall go to some one of these to be selected by some authority, or else that they are to have precedence in the order in which they are named. But there is no authority provided for or indicated in either the charter or the by-laws by whom any one of these beneficiaries shall be selected; and, therefore our conclusion is that the order in which they are named is the order in which they are to benefit by this fund; first, the widow; if there is no widow, then the orphans; if there is no orphan, then the heir, &c. In this case the question is between the widow and the personal representatives. The latter are excluded entirely by our construction of the by-laws, and therefore, the decree will be that the widow shall take the fund.

HORACE S. JOHNSTON vs. VOLTAIRE RANDALL.

LAW. No. 22,852.

{ Decided November 9, 1889.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

A note payable *ten* days after date cannot be introduced in evidence to support an action on a note described as payable *three* days after date.

STATEMENT OF THE CASE.

SUIT on a promissory note dated March 11, 1880, described as payable *three* days after date.

There were no common counts to the declaration. At the trial the plaintiff offered in evidence a note payable *ten* days after date. Defendant objected, on the ground that the note sued on, and a copy of which had been served on him, was payable *three* days after date. The objection being overruled, the note was admitted in evidence, and judgment was entered on verdict for the plaintiff.

JNO. E. NORRIS for plaintiff.

HAGNER & MADDOX for defendant.

Mr. Chief-Justice CARTER delivered the opinion of the court.

The objection made in the trial of this case below was purely technical. Nevertheless, the variance between the declaration and the proof offered was fatal. A note payable *ten* days after date cannot be introduced in evidence to support an action on a note described as payable *three* days after date.

The judgment must therefore be reversed, with leave to the plaintiff to amend as he may be advised.

JAMES F. BRIEN vs. JOHN BECK.

LAW. No. 22,853.

{ Decided November 12, 1883.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. It is error for the court to allow any papers which have not been put in evidence to be taken by the jury to their room.
2. But if the paper has been put in evidence it is in the discretion of this court whether to permit it to go to the jury room.
3. The decision of the justice trying the cause, as to whether a paper is in evidence or not forms no ground of exception.
4. Where, without consent of counsel, the court could have given permission to the jury before their retirement to take a paper out with them, the fact that permission was given without such consent *after* their retirement is not material.

STATEMENT OF THE CASE.

ASSUMPSIT for work and labor done and materials furnished.

After issue joined, the defendant gave notice to plaintiff to produce at the trial his books of original entries. The book was produced and the defendant's counsel examined the plaintiff in regard to it, questioning him as to how the charges had been made, &c. The plaintiff's counsel also showed the book to the jury and claimed that the items charged in the bill of particulars filed in the suit, were charged to the defendant in the book. After the arguments to the jury, in the course of which this book and the entries therein were referred to both by counsel for plaintiff and defendant, the jury retired, but did not, however, take with them the book referred to. Afterwards one of the jurors came to the jury room door, in the absence of counsel for both parties, and obtained it from the deputy marshal and took it into the jury room. Shortly afterwards, the jury came in (defendant's counsel being absent) and stated to the court that they had sent for the book, but, before examining it, wished to enquire of the court whether they had the right to consider it as evidence, and whether they could take it to their room and examine it in con-

nection with the plaintiff's testimony. The court (defendant's counsel still being absent) instructed the jury that the book was in evidence, and that they had the right to take it to their room and consider it with the other evidence in the case. The jury then retired taking the book with them, and afterwards found a verdict in favor of the plaintiff for \$307.45, with interest from the 29th day of January, 1881."

The defendant moved the court to set the verdict aside and grant a new trial upon the following among other grounds :

"1. Because the jury were allowed to take with them to their room and consider as evidence, a book of the plaintiff, which had not been introduced in evidence, and which was not proper evidence in the absence and without the consent of defendant's attorney.

"2. That the verdict was obtained by surprise ; in that the jury were allowed to take with them, in their retirement, said book, without the knowledge or consent of the defendant or his attorneys, and after the defendant's attorneys had been informed by plaintiff's attorney that the jury had taken nothing but the pleadings in the case."

CARUSI, MILLER & SANDS for plaintiff:

The giving of the plaintiff's book by the deputy marshal to the jury at their request might be wrong, yet the court will not grant a new trial. *Lott vs. Macon*, 2 Strobbart, 188 ; *Peachem vs. Carter*, 21 Vt., 518 ; *King vs. Burdett*, 2 Salkeld, 645.

In the case of *Commonwealth vs. Jenkins*, the officer delivered to the jury at their request, without application to the court, after they had retired, a volume of the laws of the State, containing the act upon which the indictment was founded, *which act had been commented upon by the counsel and by the court*, which volume the court would have given them liberty to take with them if requested. It was held, on motion for a new trial, not a sufficient ground for a new trial. *Thacher's Crim. Cases*, p. 118.

It appears in the record that after the jury got the book they did not examine it as to what the plaintiff had testified, but came into court and got the court's consent to take it to their room and consider it as evidence.

The sending out of papers, &c., with the jury, is regulated by the sound discretion of the court. *Little Schuylkill, &c., vs. Richards*, 57 Pa., 148; *O'Hare vs. Richards*, 10 Wright, 389; *Spence vs. Spence*, 4 Watts, 165; *Hamilton vs. Glenn*, 1 Barr, 342; *Hendel vs. Burk et al.*, 16 Serg. & Rawle, 96; *Whitehead vs. Keyes*, 3 Allen, 498; *Alexander vs. Jameson*, 5 Binney, 246.

COOK & COLE for defendant :

The taking of the plaintiff's book with them to their room and considering it by the jury, even with the sanction of the court, in the absence of defendant's counsel and without his consent, was such error and irregularity as to vitiate the verdict for plaintiff, and the same should be set aside and a new trial granted. *United States vs. Clark*, 2 Cranch C. C., 152; *Hutchinson vs. Decatur*, 3 do., 291; *Erving vs. Cook*, 15 Johns., 289; *Penfield vs. Carpenter*, 13 Johns., 350; *Lonsdale vs. Brown*, 4 Wash. C. C., 148; *Hicks vs. Drury*, 5 Pick., 296; *Whitney vs. Whitman*, 5 Mass., 405; *Benson vs. Fish*, 6 Greene (Me.), 141; *Sargeant vs. Roberts*, 1 Pick., 337; *Hackley vs. Hastie*, 3 Johns., 252; *Metcalf vs. Dean*, 1 Croke Eliz., 189; 21 Vin. Abr., Title Trial, p. 451; 2 Hall's P. C., 308; *Flanders vs. Davis*, 19 N. H., 139; *Durfee vs. Eveland*, 8 Barb., 46.

This would be the rule even if the book had been properly in evidence. *A fortiori* will the rule apply in this case, where the books had not been offered in evidence, but only referred to by witnesses and counsel.

Mr. Justice JAMES delivered the opinion of the court.

At the trial of this case, when plaintiff was a witness, counsel for the defendant asked him to look into his book of accounts which he had produced on notice, and state to

whom he had charged the work; he did so, and said that he had charged it to the defendant. The jury having retired, subsequently asked for this book and it was handed to them by the clerk. After that they came into court and stated to the judge that they had possession of the book, but because there was some doubt whether it had been put in evidence they had not looked into it, and thereupon asked whether they might do so. The court told them that it was in evidence and that they could take it and examine it as that entry. When this order was made, the counsel for defendant who had called for the book was not in court, so that the direction was given in the absence of counsel on that side. We are asked to reverse the judgment against the defendant on the ground that such order could be made only with consent of parties.

If the court allows any paper which has not been put in evidence to be taken by the jury to their room, that is error. If the paper has been put in evidence it is a matter of discretion with the court whether to permit it to go into the jury room. In many cases it would be improper to allow writings to go into the jury room because they would disturb the equilibrium of the evidence. For example, if the testimony on one side was oral and on the other in depositions, the jury would of course be likely—almost certain—to give more weight to the written testimony before them than to the oral testimony on the other side. But the general rule is, that when a paper is in evidence it is in the discretion of the court whether to let the jury have it, and that whether counsel consent or not.

If the court could, without consent of counsel, have given this book to the jury before they went out, it is not material that the permission was given afterwards. Whether it was in evidence or not we think was for the judge to determine, and we accept his determination of that fact. It appears that the counsel who called for the book told the witness, the plaintiff himself, to read the book and state what was there. Substantially he told the witness to read the book to the jury. It was commented upon by counsel on both sides, and

the court had a right to assume that counsel waived the formality of offering it in evidence.

If a dispute had arisen about it the court would have been compelled to decide whether the treatment given the paper by counsel had put it in evidence. The court has so decided, and it being a matter of discretion it is not a subject of error, We cannot reach it even if we think it was not good practice.

The judgment is therefore affirmed.

AUGUST HERRING vs. THE DISTRICT OF COLUMBIA.

LAW. NO. 19,911.

{ Decided November 13, 1888.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. Where in action to recover damages for injuries to property the Statute of Limitations is pleaded, recovery can only be had for such injuries as were incurred during the period not covered by the Statute.
2. The admission of evidence as to injuries suffered, without regard to the period covered by the Statute, is error, but will be cured by an instruction afterwards given the jury that the plaintiff cannot recover for such injuries as were inflicted prior to three years before the bringing of suit, *provided* the evidence given is such that the jury can divide the injuries inflicted within the three years from that which was incurred prior thereto, but it will be otherwise when the evidence is not of such a character.
3. Damages resulting to private property from the defective construction of a sewer by the District affords no ground of action unless it is shown that the District was guilty of carelessness either in the selection of the engineer or in the selection of a plan.

STATEMENT OF THE CASE.

MOTION for a new trial on exceptions.

This was an action to recover damages of the District for injuries to plaintiff's property ; the declaration, which was filed April 2, 1880, set forth that plaintiff was the owner of certain lots of ground in the city of Washington on part of which was erected plaintiff's dwelling-house ; that prior to the committing of the grievances complained of, the said house was safe, strong and dry in every part, and a comfortable and healthy residence for himself and family ; that the said lots were free from stagnant water. That there was a natural stream of running water flowing through the lots and emptying into Tiber Creek. That the defendant caused the grade of the street fronting upon plaintiff's property to be raised and thereafter constructed a sewer along said street and above the level of plaintiff's lots ; that the defendant attempted to divert the water of the said natural stream from its ancient channel into said sewer, but had so unskilfully and negligently made said sewer of such small size at its point of connection with said stream that ever since the year 1878 and up to the time of bringing this suit, the said sewer had failed on many occasions to carry off all the water of said stream so that it continued to run

down and along the course of its ancient bed. That after the making of the sewer the defendant then filled up a street, crossing this stream, in so negligent and careless a manner as to choke and stop up the bed thereof so that the water escaping from the sewer as well as other large quantities of water accumulated from the rainfall, was unable to find an outlet or way of escape and was consequently forced back upon and over plaintiff's lots and into his house to the depth of several feet, remaining there for more than two months, and that since said time water had lain in greater or less quantities upon and adjacent to the plaintiff's property, forming stagnant and ill-smelling pools from which noxious vapors have constantly arisen. In consequence of which plaintiff's family had greatly suffered in health, and eventually causing the death of his wife in March, 1879. That owing to the said flooding of his house a portion of it had become uninhabitable and the walls greatly weakened and injured and that his lots of ground had become almost wholly valueless, &c.

To the declaration, pleas of not guilty and that the action did not accrue within three years were interposed; to which pleas issues were joined. At the trial, plaintiff, who was testifying in his own behalf, was asked the following question:

"What has been the injury done to your house?"

To which question defendant's counsel objected unless the answer of the witness was confined to the injury done the property within three years prior to the institution of the suit. Plaintiff's counsel objecting to this modification the court overruled defendant's objection and permitted the witness to answer, whereupon he detailed the nature of the injuries and ended by saying that the loss of the use of his basement was worth five dollars a month and the damage done to the house he would estimate at \$1,000 at least; that his lots which were used for garden purposes he could not use after they began to be flooded. Plaintiff also gave testimony as to the existence of two springs in the west side of plaintiff's ground, and that the effect of the raising of the

grade of the streets was to dam up the water from the springs on that square, and sometimes flood the square, and that the water seemed to have settled on the ground and formed a kind of marsh; that there was water then standing about his house about six inches deep; that there was a creek or natural stream about eight or ten feet wide that ran near the plaintiff's property.

The testimony being closed, counsel for defendant requested the court to instruct the jury as follows :

"The plaintiff cannot recover for any damages that were caused prior to the second day of April, 1877, [and the measure of damages for injury to his property will be the difference between its value at that time, and its value at the time of the commencement of this suit.]

But the court refused to grant the part included in brackets, although allowing that portion of the prayer which referred to the statute of limitations.

The following prayers of the defendant were also refused :

"The jury cannot find a verdict for the plaintiff for damages resulting to him from any defect in the plan of sewerage adopted by the District, unless they should believe from the evidence in the case that the District had negligently selected incompetent engineers to devise such plan."

"Under the pleadings in this cause, the plaintiff cannot recover damages for any injury done his premises on account of the water flowing from the springs mentioned in the testimony given in the trial hereof."

The jury then rendered a verdict in favor of plaintiff for \$2,006, which was afterwards reduced by *remittitur* to \$1,200.

To the ruling of the court in permitting the questions objected to to be answered, and to its refusal to give the instructions prayed, the defendant reserved his exceptions.

BIRNEY & BIRNEY for plaintiff :

1. The plaintiff's counsel asked : *What has been the injury done to your house?* Question objected to, because not confined to the three years before suit. We answer :

The court charged the jury that plaintiff could not recover

damages except for the three years before suit. Defendant was therefore not injured by the answer to the question.

The question in its form covered the injury to the time of asking. It was the defendant's right, under its plea of the Statute of Limitations, to cross-examine with a view to excluding all injuries barred by the Statute.

2. Defendant asked the court to charge that the measure of damages for injury to plaintiff's property would be the difference between its value at the time of the injury and its value at the date of the suit.

We answer, if the defendant had added the words : "*Caused by the wrongful acts of defendant,*" the charge asked for would have been less objectionable ; but it would still have required the substitution of the idea of *diminution* for that of *difference*. The latter may be an increase. Suppose that extraneous causes—neighborhood improvements or the like—had given a large additional value to the property, could plaintiff recover that ? Suppose those causes had restored the property to its original value, would defendant be exempt from liability for damage actually caused by it ? The charge as asked for was imperfect and inaccurate.

3. The fourth exception assumes that plaintiff claims damages for some defect "*in the plan of sewerage adopted by the District.*"

The assumption is unwarranted. It is true that if defendant had not pleaded the Statute of Limitations, plaintiff would have offered evidence under the declaration of the insufficient size of the sewer mouth, and of great damage to plaintiff therefrom in 1873-4-5-6. No such evidence was offered.

All the evidence was under the chief averments in the second and third paragraphs of the declaration. It related directly to the damming up of the natural stream and consequent flooding of plaintiff's house and lots ; and incidentally to the three sources of the water which should have found its outlet by the natural stream.

This evidence had all been given without objection made by defendant's counsel.

While plaintiff's counsel kept carefully to proving the averments in the declaration, and showing what water could not run off by the natural outlet, defendant's counsel were desirous of giving to the case the character of an attack on the plan of sewerage.

The instruction was irrelevant. No testimony was offered by defendant to justify its damming up the stream and backing up the water so as to flood plaintiff's lots. If defendant proved that it had submitted to a competent engineer this question of damming up that stream, it might have made the point that an engineer's advice justified it in wilfully destroying plaintiff's property. One court (see *Van Pelt vs. Davenport*, 42 Iowa, 808), has held that if a city has committed to a competent engineer the decision as to the size of a culvert intended to take off surface waters, it is not liable for his mistakes ; but no court will probably ever go so far as to hold that a municipality may relieve itself from responsibility for damming up a natural stream and flooding private property by showing it had the counsel of an engineer to commit the trespass. 3 Kent Com., 439, 440 ; 2 Washb. R. P., 64, pl. 40 ; *Rose vs. St. Charles*, 49 Mo., 509 ; 55 Mo., 119 ; 66 N. Y., 62, 88 ; 65 N. Y., 341 ; *Stetson vs. Faxon*, 19 Pick., 147, 158, 510 ; *Indianapolis vs. Lawzer*, 88 Ind., 848 ; *Perry vs. Worcester*, 6 Gray, 544 ; *Gardner vs. Newburgh*, 2 Johns. Ch., 162 ; *Kellogg vs. Thompson*, 66 N. Y., 88 ; 2 Dillon on Mun. Corp., 1088 ; *Pixley vs. Clark*, 35 N. Y., 520.

"The backing of water so as to overflow the lands of an individual, * * * if done under statutes authorizing it for the public benefit, is such a taking as by the constitutional provision demands compensation." *Pumpelly vs. Green Boy Co.*, 18 Wallace, 166 ; *Wood on Nuisances*, 121, 123, 131, 133, 831 ; 30 Vt., 610 ; 38 Vt., 350.

5. Defendant claims that, under the pleadings, no damages should be given for injuries by water flowing from the springs on square 616. Plaintiff avers the existence of "a natural

stream of running water which flowed through plaintiff's said lot" on said square, and that defendant filled up the channel so that "all place of waste and escape for the water of said natural stream" * * * "was cut off and stopped."

It was not necessary for plaintiff to aver that a natural stream is made up of spring tributaries, as well as other waters, or to designate the precise locality of each spring. It was necessary for him to prove the existence of the natural stream; and the best way to do that, was to prove that it was fed by permanent springs.

FRANCIS MILLER argued the case for the District, but filed no brief.

Mr. Justice JAMES delivered the opinion of the court.

The plaintiff alleges that the District of Columbia had constructed a sewer and afterwards had made a dam across a stream of running water, so that in connection with the defective sewer it caused the overflow of the plaintiff's property. It appeared that this construction had been made some ten years before the suit had been brought and the statute of limitations was pleaded.

At the trial a witness was asked what injury was done to the property. That question was objected to because it covered injuries done during the time excluded by the statute of limitations. This objection was overruled, and the witness answered that the house was injured to the extent of about one thousand dollars, and that he had lost the use and occupation of certain parts of his property, which were worth certain sums per month. The court afterwards instructed the jury that the recovery could only be had for injuries accruing within the last three years. That cured the error in allowing testimony as to injuries before that time, so far as the rents were concerned. The rent falling within the three years could easily be found by calculation. But the error of admitting proof that the house had been injured to the extent of about one thousand dollars, without showing when that injury accrued, and without showing any means

of dividing the injury suffered within the last three years, from the injury suffered before, was not cured by this ineffectual instruction. On such testimony as that, it was impossible for the jury to find out the amount of injury suffered within the last three years; and to that extent the admission of the testimony furnished them a false basis; and manifestly misled them.

There is another reason why this judgment may not stand. The declaration charges that the injuries complained of arose partly from the defective construction of the sewer and partly from the dam which stopped a natural water-course. Therefore the verdict and the judgment were based upon two claims; one of which, namely, the defective construction of the sewer, is not a ground of action, unless it is shown that the District was guilty of *carelessness*, either in the selection of the engineer or in the selection of a plan; and on this latter point no evidence whatever was offered.

The judgment is therefore reversed, and the case remanded for a new trial, with leave to the plaintiff to amend.

WILLIAMS ET AL. vs. GARDINER ET AL.

EQUITY. No. 1,326.

{ Decided November 13, 1882.
 { The CHIEF JUSTICE and Justices COX and JAMES sitting.

Where on appeal the court in General Term remands a case to the Special Term, a bill to review the decree entered in obedience thereto cannot be entertained by the Special Term. But where the decree of the General Term extends to part only of the decree appealed from, the Special Term may entertain a bill to review so much of its own decree as was not affected by the decree of the appellate court.

2. Where a demurrer is to the whole bill and is good only as to a part, it must fail altogether unless the court grant leave to amend, which it may do.

THE CASE is stated in the opinion.

WORTHINGTON & HEALD for plaintiff.

BIRNEY & BIRNEY for defendant.

Mr. Justice JAMES delivered the opinion of the court.

This case is heard on demurrer to a bill of review. The original suit was for partition and an account of rents. The

auditor found that Wise, one of the tenants in common, had occupied a part of the premises to the exclusion of his co-tenants, and charged him for use and occupation at a certain annual rate; in a separate schedule he allowed interest on these rents with annual rests. Exceptions were taken separately to these charges, and were sustained by the court in Special Term. On appeal to the General Term the decree was reversed as to the exception to the charge for use and occupation, but nothing was said as to the charge for interest. The effect of the decree here was to allow the charge for use and occupation, and, by not reversing as to the other exception, to disallow the charge for interest. When the case was remanded, it was referred to a special auditor, who construed the decree of this court as allowing both charges, and upon his report decree was made accordingly. The bill of review attacks this decree and claims that both charges were erroneous.

As this bill was brought in the Special Term, and the decree, so far as it related to the rents, was made there in obedience to the decree of the General Term, the question arises, whether it is subject to review there.

The Supreme Court of the United States has held that when that court directs, on appeal, what decree shall be made by the Circuit Court, and such a decree is accordingly made there, a bill to review that decree cannot be sustained in the Circuit Court; since the matter to be reviewed was really the action of the Supreme Court. It was contended, however, that this court, whether sitting in General or Special term, is a unit; in other words, it is in both cases known only as the Supreme Court of the District of Columbia, and that the rule just referred to does not apply here. It is not worth while to discuss the question whether the Supreme Court of the District of Columbia may be regarded as consisting of several courts. It is enough that the law has provided a system of appeals from the court as held by one of the judges to the court as held in General Term. The action of the Special Term is subject to be reversed, and to be directed by the General Term on the appeal, and the same rule must

be applied to the powers of the former which is applied to the powers of a circuit court. Both make their decrees in obedience to a superior decree, and neither can review a decree so far as it is so made.

In the present case the Special Term decreed for a gross sum, but that sum covered both the rents and interest thereon. As to the first of these charges, it acted only to carry out the directions of the General Term, and cannot review the propriety of the action so taken. It was competent, however, to review its own action in allowing interest, since that part of its decree was not authorized or directed by this court, and such a proceeding would not involve a review of the decision of this court.

We observe that this demurrer is to the whole bill. As it is good only as to a part, it must fail altogether; but where a demurrer is too extensive, the court may grant leave to amend by narrowing its terms. The defendant has leave to do so in this case.

The demurrer was amended accordingly, and a decree was rendered for the sum remaining after deducting interest on the rents.

JOHN A. BUTLER vs. MARGARET BUTLER.

SAME vs. MARY E. BYRNE.

LAW. NOS. 22,885 and 23,178.

{ Decided November 13, 1892.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. A mere devise to two, as to, "William Joseph and John A. Butler," without more, would create a life estate in joint tenancy.
2. But whether such a devise after a previous devise of the same property for life is to be considered a life estate merely, or an estate in fee, or a joint tenancy, or a tenancy in common is to be controlled by the intention of the testator as gathered from other parts of the will.
3. Where the context of a will gives to language employed in one clause a particular meaning, the court will give the same meaning to the same language employed in another clause.

STATEMENT OF THE CASE.

Abraham Butler being seized of lot 23 in square 254 in the city of Washington, died leaving his last will and testament. The clauses relating to this piece of property reading as follows :

"I give and bequeath to my wife Sarah Butler for and during her natural life, the house and lot I own situated on the north side of F street between 11th and 18th streets, square number 290 in the city of Washington, and occupied by R. C. Washington, as my tenant, also the "Miller House" situated on the south side of F street and between 13th and 14th streets and adjoining the house in which I now reside, also the house in which I now reside, situated on F street, between 13th and 14th streets ; both of said houses are in square number 254 in the city of Washington. * * *

"And after the death of my said wife I give and bequeath to Elizabeth Catharine Earhart, my daughter, and to my son Ferdinand Butler, and to my daughter Mary Virginia Butler, the house and lot situated on the north side of F street between 11th and 12th streets, square number 290, and now occupied by R. C. Washington as my tenant, together with the piece of ground purchased by me from Henry Turner, to drain the same, and after the death of Ferdinand Butler and his daughter Sarah Butler, I desire

and request that the interest in property bequeathed to said Ferdinand Butler, shall then revert to my heirs-at-law.. *

"And after the death of my said wife Sarah Butler I give and bequeath to my sons William Joseph Butler and John A. Butler the house and premises herein described and known as the " Miller House " adjoining the house in which I now live, also the house in which I now live and the house known as the " Pat Dulany House," situated on the west side of 13th street, between E and F streets, which said house I give and bequeath to my said wife Sarah Butler, during her natural life." * * * * *

After the death of the testator, William Joseph Butler, one of the devisees named in the will, also died, leaving a last will whereby his wife, Margaret was made sole devisee of all his property, real and personal.

After the death of his brother William, John A. Butler brought these actions of ejectment to recover the whole property as surviving joint tenant. The cases were consolidated and submitted to the court below on an agreed statement of facts which raised the question whether John and William, under the devise of Abraham Butler, held this property as joint tenants or tenants in common. The court below found that they held as tenants in common.

W. D. DAVIDGE and JOHN F. RILEY for plaintiffs:

There is in the will no language employed and nothing to indicate any severance of the estate; it is such language as plainly means and has been interpreted in all the authorities to pass an estate in joint tenancy.

" Where lands are granted to two or more persons, except husband and wife, without any restrictive, exclusive or explanatory words, all the persons to whom lands are so given take as joint tenants." Greenleaf's Cruise, Title 32, Cap. 22, § 43; 3 Jarman on Wills, 1, and authorities cited; Martin vs. Smith, 6 Am. Dec., 394; 5 Binn., 16; Cowle on Devises, 356; Coke on Litt., 187 b, note 3; 2 Burrows' Reps., 1108; Crook vs. De Vandes, 9 Vesey, 197, and cases cited in note b.

The case of *Campbell vs. Herrou* (1 Taylor, N. C., 199) is exactly in point. The testator devised to his wife for life and after her death to his three daughters and to their heirs, executors, administrators and assigns forever. It was there held that the daughters took the remainder in joint tenancy.

This rule is as well recognized in equity as in law, as the above cases cited show.

Such words of severance as "to be equally divided between them," *Griswold vs. Johnson*, 5 Conn., 365; "divided equally among her children," *Whiting vs. Cook*, 8 Allen, 63; "to be equally divided between them, share and share alike," *Parks vs. Knowlton*, 14 Pick., 432, *Emerson vs. Cutler*, 14 Pick., 108, *Allison vs. Kurtz*, 2 Watts, 185; "in equal shares," *Gilpin vs. Hollingsworth*, 3 Md., 190; "share and share alike," 17 Serg. & Rawle, 61, and numerous other cases where such or equivalent language is used, have been held to make an estate granted or devised a tenancy in common instead of a joint tenancy, as it would have been without such words.

All these cases show that an estate created by such words as are made use of in the case on trial must be a joint tenancy. The ground of the decision in all such cases is that particular words were used from which the court collected an intention in the testator to create a tenancy in common.

The only variation of the rule to interpret such language as devises the "Miller House" and the "Pat Dulany House" to the two sons as passing a joint tenancy is where statutes have substantially abolished such an estate or made express provision for changing the interpretation adopted at common law. In our jurisdiction there has been no change of the common law, and estates in joint tenancy have been repeatedly recognized. *Maybury vs. Brien*, 15 Peters, 21; 4 Kent, 400, and authorities cited.

Nothing is better established than that the intent of the testator is to govern the construction of his will. It is, however, such an intention as may be gathered from the language of the will itself, and hence it is the legal inten-

tion, and not the actual intention which the law seeks after.

A general or moral view or fancy of the intention of the testator, unless expressed in the will as controlling the devises, may not be sought after, and however agreeable to a sense of the fitness of things and equality in division among beneficiaries, has no force in the interpretation of unequivocal language. *Allen vs. Allen*, 18 Howard, 385; *Miller vs. Travers*, 8 Bingham, 244; *Walston's Lessee vs. White*, 5 Ind., 297; 4 Kent, 631; *Martindale vs. Warner*, 15 Penn., 471; *American Bible Society vs. Pratt*, 9 Allen, 109.

R. T. MERRICK and J. J. DARLINGTON for defendants :

The old common law doctrine of joint tenancy, with its incident of survivorship, has been abandoned in every State and territory in the United States, unless it be held that it still lingers in the District of Columbia. Nor has express statutory provision been held necessary to its abolition. *Sergeant vs. Steinberger*, 2 Ohio, 306; see, also, *Miles vs. Fisher*, 10 Ohio, 1; *Phelps vs. Jetson*, 1 Root, 48; *Lowe vs. Brooks*, 23 Ga., 325; *Nichols vs. Denny*, 37 Miss., 59.

Unless the reasoning of these cases shall be disapproved of by this court, estates in joint tenancy no more exist here than in Ohio, and the other States noted above. For not only have we "no statutes recognizing the existence of any such principle as the right of survivorship," but we, too, have laws authorizing joint tenants, as well as tenants in common, "to demand and have partition." See Md. Act of 1794, ch. 60, sec. 8; Act of 1797, ch. 114, sec. 5.

Nor does there seem to be any reported case, either in this court or its predecessors, or in the Supreme Court of the United States, in which the right of survivorship has been recognized and enforced in this District. And the act of August 15, 1876, providing for compulsory partition between "all tenants in common and coparceners of any estate in lands, tenements or hereditaments, equitable as well as legal, within the District of Columbia," not only does not recognize, but ignores, the existence of estates in joint tenancy here.

But, if this court shall be unwilling to adopt and follow the reasoning of the very respectable courts cited above, it is established by an overwhelming and unanimous mass of authorities, that such estates are not to be favored, and that courts are "to exercise their *ingenuily* against them." See *Martin vs. Smith*, 5 Binney, 16; *Evans vs. Brittain*, 8 Serg. & R., 135; *Galbraith vs. Galbraith*, 3 Serg. & R., 392; *Bambaugh vs. Bambaugh*, 11 Serg. & R., 191; *Chew vs. Chew*, 1 Md., 168.

To the same effect are all the American authorities, and, for more than a century past, the English authorities also.

If it shall be held that estates in joint tenancy still exist here, we have, therefore, at least this established proposition to start with: that the devise in controversy here is not to be construed an estate of that description if there be any escape from such a construction; that the court is "required" as well as inclined to "give the widest and most liberal construction" to Abraham Butler's will, in order to defeat the plaintiff's claim. It is conceived, however, that, in this case, a fair and natural interpretation of the testator's meaning, as disclosed in the will, will be sufficient for that purpose.

Where words having a technical signification are used, but it is evident from the context that the testator used them in a sense different from their technical one, they are to be construed according to the sense in which the testator understood them.

And where any word is used in a will in a non-technical sense, or in a sense peculiar to the testator, the courts will construe such word in the same sense throughout the will; or, as the rule is sometimes stated, "Words are ordinarily to receive the same construction in every part of the instrument."

These two rules of construction are so well established as, doubtless, to render superfluous any citation of authorities in support of them. Some illustrations of their application, however, will be given, after their bearing upon the present case has been pointed out.

It will be observed that in the two clauses of the will in which the testator makes provision for the children of his first and of his second marriage, quoted above, the conveying words used are precisely the same. In the first he "gives and bequeaths" to Elizabeth, Ferdinand and Mary, and, in the second, he "gives and bequeaths" to William and John, without either words of inheritance or words of severalty in either case.

But, looking to the latter part of the first of these devises, it is unmistakably obvious that the testator did not understand or use these words, "I give and bequeath," without more, in their ordinary, limited, technical sense; for he goes on to provide that, after the death of *one* of these three devisees, *and of his daughter*, the *share given to him* should revert to the testator's heirs-at-law.

It is, therefore, as evident as if the testator had expressly so declared, that he understood and used the words "I give and bequeath," as conveying to his children distinct interests, which, on the death of any one of them, would pass to his child, and upon the death of that child would continue to regularly descend, unless otherwise expressly limited. In other words, the testator understood and used the words "I give and bequeath," in this clause of his will, as conveying the devised property to his children as tenants in common, and in fee, except as to Ferdinand's share, which was to be for his own life and that of his daughter only, and then revert.

This being the obvious sense in which the testator understood and used the words in question in that clause of the will in which he makes provision for the children of his first marriage, it is submitted, upon principle and upon the authorities, that he must be understood to continue so to use and understand them when he comes, in the immediately succeeding clause, to provide for the children of his second marriage.

"Where, throughout any instrument, words are used in a peculiar sense, one part may be explained by reference to another. And ordinarily words are to receive the same

construction in every part of the instrument." *Elliot vs. Carter*, 12 Pick., 442; and see *Bundy vs. Bundy*, 38 N. Y., 421; *Kiah vs. Grenier*, 56 N. Y., 220; *Tucker vs. Ball*, 1 Barb., 94; *Breasley vs. Breasley*, 9 N. J. Eq., 27; *Carnagy vs. Woodstock*, 2 Munf., 234; *Chew vs. Chew*, 1 Md., 168; *Feltman vs. Butts*, 8 Bush, 119; *Moore vs. Moore*, 12 B. Mon., 656; *Van Nostrand vs. Moore*, 52 N. Y., 12; *Van Kleck vs. Dutch Church*, 20 Wend., 471; *Tucker vs. Tucker*, 1 Seld., 418; *Hoppock vs. Tucker*, 59 N. Y., 208.

And see also the case of *Ferry vs. Langley*, decided by this court, and reported in 1 Mackey, 140, where the testator devised certain property to his daughters Eliza and Mary, "in trust for the benefit of their children," the question was whether the children took *per capita* or by groups. The court said:

"We have looked over the whole of this will to find out what was really intended. Now we find one clause giving to Eliza Ferry, a house and lot for the benefit of her children, who were evidently looked upon as a group to which this property was given as a provision. The same course was followed in the devise of another house and lot to Mary Langly and her children, whether many or few. The testator then has one more house left, and this he gives to the same mothers for their children, and our conclusion is that he intended to regard them as groups, in this instance, *just as he had done before.*"

Mr. Justice Cox delivered the opinion of the court.

These cases were actions of ejectment and depend upon the interpretation to be given to the will of Abraham Butler. He says in his will "and after the death of my said wife, I give and bequeath to Elizabeth Catherine Earhart, my daughter, and to my son Ferdinand Butler, and to my daughter Mary Virginia Butler, the house and lot situated on the north side of F street between 11th and 12th streets, square number 290, and now occupied by R. C. Washington as my tenant, together with the piece of ground purchased by me, from Henry Turner to drain the same; and after the

death of Ferdinand Butler and his daughter Sarah Butler, I desire and request that the interest in property bequeathed to said Ferdinand Butler, shall then revert to my heirs-at-law."

And for the children of his second marriage he provided as follows: "And after the death of my said wife Sarah Butler, I give and bequeath to my sons William Joseph Butler and John A. Butler, the house and premises herein described and known as the "Miller House," adjoining the house in which I now live, and the house known as the "Pat Dulaney House," situated on the west side of 13th street, between E and F streets, which said house I give and bequeath to my said wife Sarah Butler during her natural life."

William Joseph Butler died, leaving a wife and child, and John A. Butler, having the impression that he was entitled to the whole of the property as surviving joint tenant, instituted these actions of ejectment to recover the property. The only question is whether he was a joint tenant or a tenant in common with his deceased brother.

The mere devise to the two sons William Joseph and John A. Butler, without more, would give a life estate in joint tenancy. Such a devise, after a previous devise of the same property for life, would be considered by some courts a gift of the fee, but it would still be a joint tenancy. But on both questions, viz., whether it be a life estate merely, and whether in joint tenancy, or in common, light is thrown on the intention of the testator from other parts of the will.

In the previous clause to the one in controversy, if we omit the reference to Ferdinand Butler's daughter, we will have a devise to a son and two daughters generally, with a provision, that after the death of the son, the interest in the property bequeathed to him shall revert to the testator's heirs-at-law. This implies, that according to the testator's understanding of the general language he had already used, it would, but for this provision, go elsewhere. If he understood the nature of a joint tenancy, which is hardly supposable, he might have thought that it would survive to

the others. More probably, he thought that it would descend to the heirs of Ferdinand. And, indeed, the language "the interest in property bequeathed to said Ferdinand," &c., indicates that he supposed he had bequeathed a separate interest to him, and not strictly a joint interest to him and others. But this probability becomes almost certainty when we add the reference to Ferdinand's daughter. He gave nothing in terms to this daughter, but directed that her father's share after her death should revert. Did he mean by implication to give her a life estate, after a life estate which he understood he had given to her father, or did he assume that the father's share would descend to the daughter in fee by virtue of his previous general devise, and design, by this provision, to reduce it to a life estate in her? It seems to us the latter was the testator's intention.

He desires and requests, not that Ferdinand's *share* shall revert, but that the interest, *i. e., the estate*, in property bequeathed to Ferdinand, shall, *after the death of his daughter*, revert to the testator's heirs-at-law; all of which seems to assume that the *estate* bequeathed to Ferdinand was such as to descend to his daughter in fee, if not thus diverted in another direction.

It seems to us, then, that he understood his general devise in this clause, unmodified, to have the effect, of giving an estate in common, in fee simple; or, in other words, that he used the language which he employed in that sense. And inasmuch as he used the same phraseology in the following clause, we think he used it in the same sense there. The authorities seem abundantly to justify us in translating a meaning which the context gives to language employed in one clause, to the same language employed in another. And we feel especially justified in doing so, when it avoids the result, which the testator could hardly have intended, of cutting off the family of one son in favor of the other.

We think the intention was to give an estate in common to the two brothers, and that the court below was right in holding the plaintiff not entitled to recover, as claimed in the declaration.

JOHN E. KENDALL vs. WILLIAM L. VANDERLIP.

LAW. No. 21,748.

{ Decided November 20, 1882.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. Under section 716 of the Revised Statutes of this District, it is the party only who pays the illegal interest, who is given the right to recover, and not some other party; therefore, where certain promissory notes made by V. for the accommodation of T. were deposited with K. as collateral security for money loaned by K. to T. at usurious rates, V. cannot, when sued by K. upon the notes, set off against K.'s demand, the amount of the usurious interest paid by T.
2. Whether, under Section 716, R. S. D. C., the party paying the usurious interest may set off the amount so paid in an action against him by the party receiving it, *quære*.
3. Money cannot be set off against the plaintiff's demand which the defendant could not recover from him in an independent suit.
4. It is not competent for the court, where parties have paid money expressly as usury, to make a different application of it, and apply it as a payment on account of the debt and legal interest.

STATEMENT OF THE CASE.

MOTION for a new trial on exceptions.

This was an action to recover a balance of \$575.92, with legal interest claimed to be due on certain promissory notes executed by the defendant. The defendant had signed the notes at the request of, and for the accommodation merely of one Seth Terry, who desired to negotiate a loan. Terry then delivered them to the plaintiff, who advanced the money upon them without discount; it being agreed, however, between Terry and the plaintiff, that Terry was to pay five per cent. a month interest for the use of the money. Terry paid this usurious interest until the amount thus paid aggregated \$347.82. This suit being then brought against Vanderlip, as maker of the notes, the latter, besides a number of other pleas not material to be stated here, sought to have the usurious interest paid by Terry, applied in reduction of the plaintiff's claim upon the notes, and to that end pleaded it first as a partial payment, and second by way of set-off; his pleas to that effect being as follows:

"That there has been paid and discharged to the said plaintiff, on account of said several promissory notes, the sum of \$347.82, for which said sum the plaintiff has given the defendant no credit.

"That the plaintiff at the commencement of this suit was and still is indebted to the defendant in the sum of \$847. 82, for money received by him for the use of the defendant, as appears by the particulars of said debt hereunto annexed, and he is willing that the same be set-off against the plaintiff's demand."

PARTICULARS OF SET-OFF.

"John E. Kendall to William L. Vanderlip, Dr.
To money paid plaintiff for the use of the defendant (W. L. Vanderlip)..... \$847 82."

Issue being joined, the plaintiff on the trial, after proving the execution and delivery of the notes rested. The defendant, then having proven the facts above stated, and having placed Terry upon the stand, asked him the following question :

"How much, if any, money did you pay, or cause to be paid to the plaintiff as usurious interest, at the rate of five per cent. per month before this suit was brought, and within one year, immediately preceding the 7th day of September, 1881?"

Whereupon plaintiff's counsel objected to the question ; and the court, the defendant excepting, sustained the objection. The jury having found for the plaintiff, for the amount claimed, and a motion for a new trial being overruled, the case came to this court on the exception to the above ruling.

LEON TOBRINER for plaintiff :

1st. Section 715 of the Revised Statutes of the District of Columbia contemplates, it will be observed, an *executory* contract, in which case if there be a usurious agreement, the plaintiff merely recovers his principal.

Section 716 contemplates an *executed* contract, and provides for an *aggressive not a defensive action*—it allows the person *who has paid* usurious interest to *sue for, and recover all the interest* paid upon a usurious contract.

It is submitted that the statute having created a new

right, and declared the remedy, the right can only be enforced in the manner, and the remedy can only be that which the statute prescribes. *Farmers' National Bank vs. Dearing*, 91 U. S., 35; *Barnet vs. National Bank*, 98 U. S., 558.

In the case of the *Bank vs. Dearing*, the Supreme Court says: "Where a statute creates a new offense and denounces the penalty, or gives a new right, and declares the remedy, the punishment or the remedy can be only that which the statute provides."

In *Barnet vs. The Bank*, a case involving the right to set off usurious interest under what is known as the National Bank act, which provides, "and in case a greater rate of interest *has been paid*, the person or persons paying the same, or their legal representatives, may recover back in any action of debt twice the amount of interest thus paid," the Supreme Court says: "In the first defense, the payment of the usurious interest is distinctly averred, and it is sought to *apply it by way of off-set or payment* to the bill of exchange at suit. In our analysis of the statute we have seen that this could not be done. Nothing more need to be said upon the subject;" and further: "Where a statute creates a new right, and provides a specific remedy or punishment, they alone apply. Such provisions are exclusive."

That a claim arising out of the penalty under the usury law was not intended to be used by way of set-off, is evident. The act respecting set-off, was passed February 22, 1867—fully three years before the act regulating the rates of interest (April 22, 1870), and yet in the latter act, there is no provision for set-off, but an affirmative remedy is only provided.

"The usury laws can only be taken advantage of as a defense in the manner prescribed by law." *Ramson vs. Hays*, 39 Mo., 448; *Hadden vs. Imes*, 24 Ill., 384; *Bank vs. Sherwood*, 10 Wis., 184; *Eastwood vs. Kennedy*, 44 Md., 563; *Wiley vs. Yale*, 1 Metc., 553.

2d. The defense of usury is personal to the party paying or contracting to pay the same.

Sec. 716, R. S. D. C., *allows the person paying usurious interest to sue for, and recover the same.* The right under this act is, therefore, *personal to the party paying.* *Lazear vs. Nat. Union Bank of Maryland*, 52 Md., 122; *Cady vs. Goodnow*, 49 Vt., 400; *Farmers' and Mechanics' Bank vs. Kimmel*, 1 Mich., 84.

3d. Is the claim arising out of the alleged payment of usury such a claim as can be made the subject-matter of a plea in set-off *by the defendant in this case?*

Sec. 810 of the R. S. D. C., provides: "Mutual debts between the parties to an action, may be set off," &c., &c.

To be mutual, the claim or debts sought to be set off must belong to the defendant *in his own right*, it must be such that he could maintain an independent suit thereon *in his own name.* *Waterman on Set-off and Recoupment*, §150 *et seq.*

This the defendant could not have done with the claim he seeks to establish as a set-off; it therefore does not meet the requirements of a "mutual debt."

E. A. NEWMAN for defendant:

A debt arising out of a penalty is the proper subject of set-off. Sec. 810, Rev. Stat., D. C.

Set-off is in the nature of a cross-action. *Chase vs. Strain*, 15 N. H., 585.

Statutes of *set-off* ought to be liberally expounded to advance justice and prevent circuity of action. *Pate vs. Gray*, 1 Hemp., Ark., 155.

Money paid as usury may be set off against the principal in an action for the principal. *Cook vs. Lillo*, 103 U. S., 792; *Farwell vs. Meyer*, 35 Ills., 40; *Sayler vs. Daniels*, 37 Ills., 331; *Fay vs. Lovejoy*, 20 Wis., 424; *Wood vs. Lake*, 13 Wis., 94; *Dole vs. Northup*, 19 Wis., 266.

In the case of *Ewing vs. Griswold*, (43 Vt., 400), the court used this language: "The general right of a defendant in an action of *assumpsit* to offset any claim that he might recover in a declaration for money had and received cannot be questioned, and we think there is no reason or authority for making the action to recover usury an exception."

Where, upon a promissory note, the plaintiff has received interest above the rate fixed by law, the defendant in a suit upon the note is entitled to have such excess deducted. *Larabee vs. Lambert*, 32 Me., 97 ; *Loud vs. Merrill*, 45 Me., 516 ; *West vs. Meddock*, 18 Ohio St., 418.

Surety or accomodation maker may take advantage of usury. *Livingstone vs. Harris*, 11 Wend., 329 ; *Post vs. The Bank*, 7 Hill, 391 ; *Thompson, Ex'r, vs. Thompson*, 8 Mass., 135 ; *Smith vs. Cooper*, 9 Iowa, 376 ; 9 Iowa, 254 and 276 ; 33 N. Y., 31.

A fair construction of our statute touching usury, as compared with the construction given similar statutes, would authorize the party bound by the usurious contract to plead set-off or recover usury. Rev. Stat., §§ 713 to 717, inclusive ; *Cole vs. Savage*, Clark's Ch. R. (N. Y.), 487, and authorities cited, *supra*.

Mr. Justice Cox delivered the opinion of the court.

This is an action of assumpsit to recover a balance of \$575.92, alleged to be due on certain promissory notes, with interest from the 9th of March, 1868.

At the trial it appeared that Vanderlip, the defendant, was simply an accomodation maker of the notes for the benefit of a third party, one Seth A. Terry, who was not a party to the notes. Terry delivered the notes to Kendall (although they were in form made payable to Kendall in the first instance) and received the full amount of them from Kendall ; and, under the plea of set-off, there was an offer to prove for the defence, that at the time Terry obtained the money from the plaintiff, there was a stipulation to pay him extra interest at the rate of five per cent. a month, and that Terry did, in fact, pay as such extra interest, the sum of \$347.82 ; and the defendant claimed the right to have this sum deducted from the \$575.92, the balance due on the notes, of principal and legal interest. The court below refused to admit the evidence on this point, and exception was taken ; and the only question before us in the case is : Had the defendant the right to have this deduction made, that is to have this usurious interest deducted from the legal debt?

The arguments for the defence in support of this offer were :

1st. That the Revised Statutes of the District of Columbia give the right to a party who pays illegal interest to recover it in an action.

2d. That where a party has a right to maintain an action for a money demand, he has a right to set that off against a demand in an action against him.

3d. That the maker of the note is competent to make this defence as well as any other party.

On the part of the plaintiff two answers to this claim are made. It said, first, that the Revised Statutes of the District provide a new right and declare the remedy, and that in such a case, only the specific remedy which the law prescribes can be resorted to. Section 716 of the Revised Statutes of the District gives simply the right to sue for the illegal interest paid—not the right to set it off by way of defence in an action ; and decisions of the Supreme Court have been appealed to, in which it has been held that, although the National Bank act provides that a party paying illegal interest may recover twice the amount in an action, yet he cannot set off the amount so illegally paid, in an action against him, his only remedy being the one provided for in the act. It is a question with us whether this decision would govern in a case arising under the law of the District, which does not give the right in exactly the same shape as that in which it is given by the National Bank act ; but it becomes unnecessary in this case to decide that question.

The second point is that the law of set-off applies only to mutual demands. That is, that the defendant may set off a demand which *he* has against the plaintiff, but not a demand which belongs to another party. Under our statute, it is *the party paying the illegal interest* to whom is given the right to recover, and not some other party. The language of the statute is : “ If any person or corporation within the District shall directly, or indirectly, take or receive any greater amount of interest than is provided for in this chapter, upon any contract or agreement whatever, it shall be

lawful for the person, or his personal representative, or the corporation paying the same, to sue for and recover all the interest paid upon any such contract or agreement." Now, in this case, the illegal interest was paid by Terry, for whose accomodation these notes were made, not by the maker of the notes ; and it is very plain that the maker cannot maintain a suit against Kendall to recover money paid by Terry, a third party, out of his own pocket.

This being the case, the defendant cannot set off in this suit this claim which he could not recover in an independent suit against the party to whom it was paid. This answer is, we think, conclusive, at least upon the defence made in its present form. Indeed, this very question has been decided by the Court of Appeals in Maryland, and also by the court of last resort in Wisconsin, in a case almost exactly like the present, with the exception that there the party for whose accommodation the note was made was a party to the paper, whereas in this case Terry was not a party to these notes. In that case, it appeared that the defendant had never paid the plaintiff anything upon the note, either as interest or usury, but that the person for whose accommodation it was endorsed had ; and the court held that, so far as the personal payments were concerned, the defendant could not apply them to his own benefit, either as payment or as set-off.

So that, as far as this evidence was offered by the defendant to sustain the plea of set-off, we think the court below was correct in ruling it out.

We have looked through the record and the decisions cited, to see whether the defence could not be made in some other form. There is a plea of partial payment covering the same facts. Now, if this money could be treated as a payment on account of the principal and legal interest, no matter by whom paid, such payment would, of course, reduce the debt by so much, and the plaintiff could only recover the balance actually due. Perhaps, then, if this could be treated as such a payment, although the evidence was offered in support of the defence of set-off, it would still be pertinent under the issues in this action ; but the question is : Will the law im-

pute or ascribe or apply a payment made expressly as usury, to the principal and legal interest of a debt? There is a great difficulty in doing this. The case put is that of a debt, partly legal and partly illegal—not illegal in the sense of *malum in se*, but in the sense of *malum prohibitum*, and it may be regarded also as made illegal for the benefit of the defendant. Now, the question is, whether, when payments of this character have been made and applied to illegal interest by consent of both parties, it is the duty of the court to apply those payments to the part of the debt which is legal and not to that which is illegal? When the parties have agreed that the payment shall be applied to a part of the debt which was not legally binding, and have actually made such application, can the court step in and say: We will undo all that and make a new agreement for you, so that this payment shall be applied, not to the part of the debt which is usurious but to that part which is legal? It seems to us that to do this would be transcending the power of the court.

A number of cases have been cited on the part of the defence from the reports of Wisconsin, Illinois, New York, Massachusetts and Iowa. In one case in Wisconsin it was held that the party should be allowed to deduct, by way of set-off, the interest which had been illegally paid. The payment was expressly relied upon as a set-off, not as an application of the illegal payment to the legal part of the debt.

In an Illinois case general language was used to the effect that the party might deduct; but the pleadings are not set out, nor does it appear on what principle the court so held.

In certain cases cited from the Maine reports the right to deduct was allowed expressly upon the authority of the revised statutes of that State.

The New York and Massachusetts cases cited have no application to this direct question.

There is an Iowa case which holds that where the party gave a separate note of \$300 to cover usury upon another debt, the defendant, who had himself given and paid the note, might claim to have it deducted.

In other words, notwithstanding the application of the payment made by the parties themselves, the court undertook to make another application, and to treat it precisely as it would treat a payment made without any specific appropriation; but that decision seems to be contrary to the whole tenor of the authorities. We think, therefore, that it is not competent for the court, when parties have actually paid money expressly as usury to afterwards make a different application of the money, and apply it as a payment on account of the debt and the legal interest. So that even in connection with the defence of partial payment, this evidence was not admissible. The judgment is, therefore, affirmed.

The Chief Justice dissented.

MOSES SOLOMON vs. SARAH GARLAND.

LAW. No. 20,682.

{ Decided November 20, 1882.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. The effect of sections 727 and 728 of the Revised Statutes relating to the District is to render a married woman competent to act in her character of proprietor of her separate estate, just as any other proprietor may act. Not only may she give away, sell, lease or lend her separate property, but she may charge it with any kind of lien, and she may do so by the same acts or contracts which would operate in the case of any other proprietor.
2. In addition to the absolute contract power given her by these two sections, in cases where her separate property was the subject-matter of the contract, Congress went further and gave her in the next section a like power in certain other defined cases where the subject-matter of the contract was not her separate property, but something "having relation" to it, although it was a matter in which, previous to the contract, she had no interest or right.
3. The question whether the alleged contract is about a matter having the required relation to her separate property, is a question of law.
4. That is not, within the meaning of the statute, a matter having relation to her separate property, when there is a *total absence* of all right to claim, as her property, that to which the subject-matter of the contract is alleged to have relation.
5. But this ruling is not to be taken as meaning that, in ascertaining the existence of a separate property to which the matter of contract must have relation, the question whether her title is a good and valid one will be tried.
6. The furnishing of a house belonging separately to a married woman

is a matter having relation to her separate property within the meaning of the statute.

7. An executory agreement by a married woman to purchase a house, is binding upon neither party. She will not, therefore, by virtue of such agreement, be the owner of a separate estate in relation to which she may make a contract.
8. Whether a married woman who takes a lease of a house, and thereby acquires a term, may contract for the furnishing thereof, as a matter having relation to her property in the term, *quære*.
9. A married woman being in the occupation of a house and premises, it was contended that, as she could not be dispossessed by the owner without thirty days' notice, she was, therefore, the owner of a term in the premises to that extent; that such a term was her separate property, and that the purchase of furniture to furnish this house was a matter having relation to her right to possess it for this term.
Held, That the thirty days' notice is a limitation upon the landlord's remedy, and that the occupation meanwhile being on sufferance has not the quality of a term; it is not assignable, and has none of the traits of property, and therefore cannot be treated as the separate property of a married woman.
10. The statute gives to a married woman power to make certain contracts when she actually has separate property, but she is not given that power by merely pretending to have such property. The question is one of legal capacity, and a fraudulent pretense that the capacity exists cannot create it. The doctrine of estoppel has, therefore, no application to a case of that kind.
11. A married woman made a purchase of furniture. The contract had no relation to her separate estate, but she promised to pay for the goods out of the rents derived from a house which was her separate property.

Held, That at law this was a mere promise to pay money, and that a married woman's promise to pay for that which does not relate to her separate property cannot be enforced. Whether such a promise would operate as a charge upon her rents and could be enforced in equity, *quære*.

STATEMENT OF THE CASE.

MOTION for a new trial on exceptions.

This was an action to recover of the defendant, a married woman, a balance due upon a purchase of furniture by her. The declaration alleged the ownership by defendant as her sole and separate estate, of a house on Sixth street, in the city of Washington, and a purchase of furniture by her from plaintiff for use in said house, upon a promise of the defendant to pay for the same out of her separate estate. Upon the trial it was shown that the defendant was a married woman living with her husband and owning in her own right in fee-simple, as her separate estate, the house and premises No. 107 Sixth street, in Washington. In the early part of 1877 there were large dealings in furniture between plaintiff and

defendant, and when the account was settled a balance of \$160 was found due the plaintiff.

In July, 1877, defendant ~~went to plaintiff's store and asked~~ a further credit. She stated at the time that she was the owner of a house on Corcoran street, and of other property; that she received \$300 a month rent for her Sixth street house, and that she would pay the plaintiff \$50 a month out of such rent until her account was squared.

On these representations, goods of the value of \$311.27 were then sold to her. Part of the goods thus sold, comprising a Brussels carpet and some minor articles charged at \$125, were delivered at the Sixth street house, the balance was delivered at the house on Corcoran street.

It was shown that at the time of the sale and delivery of the furniture, the defendant had a parol agreement for the purchase of the Corcoran street house, and was in occupation thereof, but the purchase of the property was never perfected by her. Subsequently to July, 1877, the defendant paid on the account \$320, leaving still due \$151.27, for which this suit was brought.

This being all the evidence offered, the defendant thereupon prayed the court to instruct the jury that :

"The plaintiff is not entitled to recover in this suit for any furniture sold for the use of, and delivered at the house on Corcoran street, there being no proof that said house was the separate estate of the defendant."

Which prayer being refused, the following was then offered :

"That the purchase of household furniture by a married woman, living with her husband, which is not necessary to the beneficial enjoyment of her then existing separate estate, is not a contract in a matter having relation to her sole and separate estate."

This was also refused, as was likewise the following :

"That a married woman, living with her husband, cannot render herself personally liable on an oral contract for the purchase of household furniture which is not necessary to

the beneficial enjoyment of her previously existing separate estate."

All the prayers of the defendant being refused, the court then charged the jury substantially:

"That if they believed from the evidence that she bought the goods on the credit of her separate estate, and so stated at the time, it is immaterial where they were delivered; and if the defendant, being the owner of separate estate, purchased this property, stating to the person from whom she bought, that it was for her separate estate, it was enough, and she is responsible in this action. She is just as liable for a false and fraudulent statement as for a true one."

The jury then found for the plaintiff for the amount claimed, and the case came to the General Term on exceptions by the defendant to the refusal of the court to instruct the jury as prayed.

BIRNEY & BIRNEY for plaintiff.

HAGNER & MADDOX for defendant.

This case presents the question whether the purchase of household furniture by a married woman, on open account, with a promise to pay for same out of the rents of a house owned by her, in her own right, as a separate estate, creates an obligation on which she will be liable in a suit at law. The case does not come within the requirements of the married woman's act, as expounded by this court in *Harmon vs. Garland*, 1 Mackey, 1. There, in the verdict, the jury found that "said furniture was bought and used by defendant for furnishing a house forming part of her separate estate, which house, so furnished, said defendant thereafter rented." On this state of facts, the court says: "We think it a fair inference from the verdict in this case, that the defendant, in order to rent the house to advantage, had to furnish it." In other words, that it was necessary for the *beneficial enjoyment of her then existing separate estate*.

There was no room for such an inference here. The evidence offered showed simply a purchase of furniture and a delivery of same—part at a house on Sixth street, the balance

at a house on Corcoran street. There was not a scintilla of proof that the defendant at the time of the various purchases, stated even that they were for the purpose of furnishing houses belonging to her. It cannot be inferred from this that the furniture was necessary "in order to rent her houses to advantage." *Non constat* that the purchases were not made for the purpose of engaging in business as a trader in furniture. For these reasons it follows that there was error in refusing to instruct as prayed in the second and third prayers.

The case would rather fall within the rulings as laid down in *Rich vs. Hyatt*, 3 Mac Arthur, 586, where it was held that the statute confers on married women no new rights in respect of the means of acquiring property, and that it does not authorize her to make an executory contract for the purchase of another's estate. Or in *Schneider vs. Garland*, 1 Mackey, 350, where it was held that it is not enough to render her liable at law to say that the goods were sold on the faith and credit of her separate estate, and on her promise to pay out of said estate. The same ruling was made in *McDermott Bros. vs. Garland*, 1 Mackey, 496.

The court's charge to the jury was almost identical with that in *Schneider vs. Garland*, *supra*, with the additional infirmity that there is in the evidence adduced no proof that she stated to the person from whom she made the purchase, that "it was for her separate estate." The facts disclosed no such statement.

The charge also touches upon the question of estoppel, and the same point is raised by defendant's first prayer.

It would seem that estoppel, either by deed or *in pais*, does not apply to a married woman, she being supposed to be under the compulsion of her husband, and therefore unable to *assent* to a contract. *Lowell vs. Daniels*, 2 Gray, 168; *Bank vs. Lee*, 13 Peters, 119; *Kun vs. Coleman*, 39 Pa. St., 299; *Adelphi Loan Ass. vs. Fairhurst*, 9 Ex. (W. H. & G.), 422.

It certainly could not be carried to the extent of creating a separate estate by estoppel, which is necessary to meet the

exigencies of this case. This would be a veritable legal absurdity.

But the doctrine of estoppel has little or no application to the case. It is in evidence that the defendant, at the time of *asking a further credit*, stated to the plaintiff that she was the owner of a house on Corcoran street. Ordinarily it would still have been necessary for the plaintiff, in order to maintain his suit, to show that this house was her sole and separate property within the purview of the statute. In this he not only failed, but actually showed that the defendant never had the legal title to the property. Further than this, there is no averment in the declaration, nor was there anything in the proof to show that defendant, at the time of purchase, told the plaintiff that the furniture was intended for use in the Corcoran street house. This action is brought only for goods sold for the use of and delivered at the Sixth street house. Any question over furniture delivered at the Corcoran street house was *coram non judice*.

Mr. Justice JAMES delivered the opinion of the court.

It appears by the bill of exceptions that the defendant is a married woman, living with her husband ; that, at the time of the transaction on which this suit is based, she owned, as her separate estate, a house and lot on Sixth street in Washington; that in the early part of the year 1877 there were large dealings in furniture between plaintiff and defendant, and that upon settlement of that account a balance of \$160 was due to plaintiff; that in July of that year defendant applied to plaintiff for a further credit; that she stated to plaintiff at that time that she was the owner of a house on Corcoran street, in this city, and of other property; "that she received three hundred dollars a month rent for her Sixth street house, and that she would pay the plaintiff fifty dollars a month out of such rent until her account was squared;" that "on these representations, goods of the value of \$311.27 were then sold to her;" that "part of the goods thus sold, comprising a Brussels carpet and some minor articles, charged at \$125, were delivered at the Sixth street

house, and the balance was delivered at the house on Corcoran street."

"It was shown that at the time of the sale and delivery of the furniture, the defendant had a parol agreement for the purchase of the Corcoran street house, and was in occupation thereof, but the purchase of the property was never perfected by her. Subsequently to July, 1877, the defendant paid on the account \$320, leaving still due \$151.27." It is stated by the bill of exceptions that this was the whole of the evidence offered at the trial.

Thereupon the defendant prayed the court to instruct the jury: 1st. That "the plaintiff is not entitled to recover in this suit for any furniture sold for the use of and delivered at the house on Corcoran street, there being no proof that said house was the separate estate of the defendant." 2nd. That "the purchase of household furniture by a married woman, living with her husband, which is not necessary to the beneficial enjoyment of her then existing separate estate, is not a contract in a matter having relation to her sole and separate estate." 3rd. That "a married woman, living with her husband, cannot render herself personally liable on an oral contract for the purchase of household furniture which is not necessary to the beneficial enjoyment of her previously existing separate estate." All of these prayers were refused and exceptions were taken.

After refusing these prayers, the court charged the jury substantially:

"That if they believed from the evidence that she (the defendant) bought the goods on the credit of her separate estate, and so stated at the time, it is immaterial where they were delivered; and if the defendant, being the owner of separate estate, purchased this property, stating to the person from whom she bought that it was for her separate estate, it was enough, and she is responsible in this action. She is just as liable for a false and fraudulent statement as for a true one." To this instruction defendant duly excepted.

It is convenient to state generally the conclusions of the majority of the court upon the facts presented by the bill of

exceptions, and to consider afterwards how far the rulings at the trial conform to them.

Section 727 of the Revised Statutes for this District define the *status* of what is there called the "sole and separate property" of a married woman, and section 728 states her power of control over it. The effect of one of these provisions is to absolve the property itself, and of the other to absolve the wife, as owner of it, from the control of the husband. She is made competent to act, in her character of proprietor, just as any other proprietor may act. Not only may she give away, sell, lease, or lend her separate property, but she may charge it with any kind of lien, and she may do so by the same acts or contracts which would operate in the case of any other proprietor. If the act had stopped there, a married woman's contract power, absolute and complete as it would have been within its limits, would nevertheless have been strictly limited to control over the *res* known as her separate property; and she would have remained, in all other respects, under the disabilities imposed upon her by the common law. But Congress went further, and, in addition to absolute contract power in cases where her separate property was the subject-matter of the contract, gave her, in the next section, a like power in certain other defined cases, where the subject-matter of the contract was not her separate property, but something "having relation" to it. In respect to this matter, also, she was empowered by the statute to make a contract, although it was a matter in which previous to such contract she had no interest or right. The common law was altered by the statute only to this extent, and in matters not having such "relation," married women in the District of Columbia were left as they had been placed by the common law. As this is a question of legal capacity, the question whether the alleged contract is about a matter having the required relation, is necessarily a question of law, and addresses itself to the court. In the cases which have heretofore arisen under this statute, this question has been so treated. We take the rule, then, to be this, that when the statute gives to a mar-

ried woman absolute contract power in a matter "having relation to her sole and separate property," it contemplates, first, the existence of something which is capable of being regarded, either at law or in equity, as her sole and separate property; and, secondly, that the matter shall have relation to that property. We do not mean that, in ascertaining the existence of a separate property to which the matter of contract must have relation, the question whether her title is a good and valid one will be tried. It is enough to say for the present that there must not be a total absence of all right to claim as her property the property to which the matter in contract is alleged to have relation. In such case the matter claimed to have relation cannot be held, within the meaning of this statute, to be a matter having relation to her sole and separate property. It is obvious that this power to contract in relating matters was given in order that she might have the largest and completest enjoyment of her actual property. In order that she should have this, it was not enough that she should merely be able to dispose of that property; she must be able to make contracts which secure to her the full use and enjoyment of it while she holds it. But the incidental or relating power is not to be construed to apply where the principal power cannot. In giving her power to contract in matters having relation to her separate property, Congress cannot have intended that she might exercise it in cases where she had nothing over which she could exercise the disposing power given by the previous provision of the same statute. It could not have been intended, by this additional contract power, to secure or enlarge her enjoyment of what she could not pretend to have at all. The whole statute must, of course, be construed together; and as the provision giving her absolute control over her separate property contemplates the actual existence of such property, so the provision giving her power to contract in matters relating thereto contemplates the same thing. Such matter must relate to something which comes within her power of direct control. Let us apply these principles to the facts of the case before us.

Undoubtedly the furnishing of a house belonging separately to a married woman is a "matter having relation" to her separate property within the meaning of this statute, and this court has so held. Without power to contract in such a matter she could not enjoy, as the statute intends she shall, the full benefit of proprietorship. She could own and sell, but could not use, her house. But does the defendant's purchase of furniture for the Corcoran street house come within this principle? Can that house be treated as in any sense her property, so that another matter may have the relation to it intended by the statute? Did she acquire even a pretence of title by the alleged executory contract for its purchase? We are of opinion that the so-called contract was not, as to either party, a contract at all.

The statement of the bill of exceptions, that the defendant "had a parol agreement for the purchase of the Corcoran street house, and was in occupation thereof," is imperfect. It does not show that she had paid for the house, and only lacked a conveyance to perfect her title. We must suppose, therefore, that there was only a promise on one side to sell and on the other to buy, and that Mrs. Garland's promise to purchase was the consideration of the promise to sell. This presumption is confirmed by the fact that the plaintiff took pains to prove that she was in possession. It is not shown that she entered under the agreement of sale, and it is immaterial whether she did so or not. Part performance of a contract which both parties are competent to make may relieve the party performing of the operation of the Statute of Frauds, and thus enable him to insist upon performance on the other side; but this defendant's part performance of a promise which the law disabled her to make would not bind her to a complete performance, or make her promise valid. She could not become a legal promisor by acts if she could not by a written and express promise. This would be to make her competent to promise, because she pretended to have that power. Legally, then, there was no promise to purchase the Corcoran street house; the promise to sell was without consideration and could not be enforced.

In other words, there was no *contract* for the sale and purchase of the Corcoran street house. So familiar a principle hardly calls for the citation of authorities, and we shall refer to but one. "Courts of equity," says Story (Eq. Jur., 787), "will not carry into specific execution any merely *nude pacts* or voluntary agreements, not founded upon some valuable or meritorious consideration ; nor between parties not *sui juris* or competent to contract, as infants and *femes covert*." See, also, Story's Eq., sec. 728.

It is objected that, in applying this clause of the statute, the court will not consider whether the property, to which another matter is said to relate, is held by a good title. That proposition, as stated, is correct, but it is not involved in this case. This defendant had no pretence of title, inasmuch as her claim of equitable title must rest upon an executory contract which the law disabled her to make, and which she could not possibly enforce. She was simply a stranger to what is alleged to have been her separate property.

A pretence of separate property has been made, however, upon another ground. It was suggested that, being lawfully in possession, she could not be dispossessed by the owner without thirty days' notice ; that she may be said, therefore, to have a term in the premises to that extent ; that such a term was her separate property, and that the furnishing of *the house* had relation to her right to possess it for this term. It is not necessary to consider here whether a married woman who takes a lease of a house, and thereby acquires a term, may contract for the furnishing of that house as a matter having relation to her property in the term. It is enough to say that no term is shown here. The thirty days' notice is a limitation upon the landlord's remedy, and the occupation on sufferance has not the quality of a term. It is not assignable ; it has none of the traits of property, and therefore cannot be treated as separate property of a married woman.

It was also urged in argument that, as the furniture for the Corcoran street house was sold on the strength of her as-

insurance that it was her separate property, she is estopped to deny such ownership. We have already said that this statute gives to a married woman power to make certain contracts when she actually has separate property, and has not given it when she merely pretends to have such property. To say that she must be deemed actually to have separate property by reason of an estoppel of this kind, is merely a misapprehension of the principle of estoppel as applied to estates. This is a question of legal capacity, and a fraudulent pretence that the capacity exists cannot create it. The case in which she has power to incur a personal obligation does not come into existence by operation of an authorized attempt to incur it.

We have said that a married woman may charge her separate property with a lien, and that she may do so by the same acts or contracts which would operate in the case of any other proprietor; and it has been suggested that, upon this principle, the defendant's promise to pay fifty dollars a month out of the rents of her Sixth street house may be treated as an appropriation of, was charging a lien upon those rents, in consideration of the sale to her. If that be so, such a charge cannot be enforced in this action for the price of the goods. At law such a promise can only be treated as a mere promise to pay money; and a married woman's mere *promise to pay* for that which does not relate to her separate property cannot be enforced. Whether a charge upon defendant's rents could be enforced in equity, we need not decide.

With these views we must reverse the judgment.

Mr. Chief Justice CARTER dissenting:

There are two things unembarrassed in this case, and not inconsistent with each other. One is, that the defendant was a *feme covert* with a separate estate. There is no trouble about this; where it was and what it was is another question. And she had been advanced, under the law, to the condition of a *feme sole*, in dealing with her separate estate. That proposition is also unembarrassed. The plaintiff in

this case sold her this furniture upon the credit of her separate estate, and she took it—it was delivered to her and she took a part of it to her house upon Sixth street and a part of it to her house upon Corcoran street—whatever title she held it by. She said it was her separate property, and upon the faith of that declaration she obtained the furniture in question, and in my opinion the logic involved in the power to make a contract makes the party to it amenable to all the intendments of the law, whether male or female, *feme covert* or *feme sole*; that the philosophy of privilege and of conduct necessarily blends with the administration of justice when you have a party capable of making a contract; that there is no new set of rules to control rights of *femes covert* enlarged to the condition of *femes sole* as peculiar to them, but they assume with their right all of the obligations of the law, and to the parties with whom they contract, as effectually as though they were of the masculine gender.

It is a masculine act; it is the exercise of masculine authority over property, and it never entered into the contemplation of the law that there was to be a new mode of administering rights under it. This being so, this woman applied to the plaintiff to buy his goods for and on account of her separate estate; she got them; she has them now; and the question is, whether they shall be charged, not upon her husband, but upon her separate estate, that has been enlarged and enriched out of the substance of the plaintiff. It has become a very interesting issue in this case what the precise degree of the title to her property is, whether equitable or legal, valid or void, and we are introduced into an equity examination to determine the real character of the title. Now does this law contemplate any such thing? Does it contemplate, in a transaction over personal property, where one party applies to another to buy or sell, that the court, in ascertaining whether she is liable as a *feme sole* or not, shall ascertain whether the t's are crossed in the deed that constitutes the title to her property, or whether it is by leasehold, or whether it can be enforced in a court of equity? She said it was her property and she was in the

occupation of it as a domicile ; the furniture went to that domicile and was employed by her there ; why not believe her ! The law would compel you to believe a man, why not believe a *feme sole* ? The law would not permit a man, after buying property on account of other property, to say to the party that he purchased it of, "My title is not very good to this property ; in fact, I haven't got any ; it is only a possessory title that I have, and I am liable to be turned out at any time by process of law." Now the law would not listen for a moment to a man with that plea ; the law would say to him, "You said it was your property ; you lived in it and occupied it ; you took the plaintiff's goods into it as your separate property, and the law will not permit you to deny it." Now, I cannot discover, with all the reflection I have given the subject, why the same rule should not apply to this case. I do not understand why a woman should be permitted to deny with impunity when a man may not.

I think the doctrine of estoppel is applicable in this case, although it may be that the justice below laid down the rule a little too broadly, for this court has said—and I think properly—that the contract which a *feme covert* is enabled to make must relate to her separate estate. The purchase of furniture would relate to it ; the purchase of a halter for a horse or oats to feed him would relate to it ; tools for a farm would relate to it, because they enter into the enjoyment—the occupation of the property. But it seems to be indicated in the charge of the court below, that it is only necessary to show that she said the purchase was on account of her separate estate, and that she would be estopped by that declaration. Perhaps this is carrying the rule beyond what has been held by the court, and beyond the intentment of the statute ; but it did not affect the merits of this case, for here you have a separate estate revealed to the court. It matters not whether it was on Sixth street or Corcoran street where one part of this furniture went and where another part went ; here you have the property *in esse*. I care not what the estate is, whether it is a possessory estate or a leasehold estate, provided it is a separate estate, and

where that is shown then any declaration of the party inconsistent with the existence of that estate comes with all the obligation that it does upon anybody else. These are the considerations that advise my dissent to this opinion.

GEORGE E. MOORE

vs.

ANDREW LANGDON AND AMZI L. BARBER.

LAW. No. 19,911.

{ Decided November 27, 1883.
{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. In an action to recover damages for a private nuisance on the premises of the defendant, it is error to admit in evidence an official letter addressed by a municipal officer to the defendant notifying him of the existence of a public nuisance upon his property and directing him to abate it. Such a letter, if regarded as an official proceeding, is *res inter alios*; if treated as a declaration of the fact, it is mere hearsay. It is also objectionable because it refers only to the existence of a public nuisance, and could not therefore establish the fact of a private nuisance.
2. That which is a public nuisance affords no ground of action unless it is also a private nuisance.
3. A verdict will be set aside when evidence calculated to exercise a decided influence upon the minds of the jury has been improperly admitted.
4. Where one owning a piece of ground lays it off into lots and streets, and, after sewerage the streets, sells the lots, each lot being sold with an easement in these sewers, he thereby parts with his right of control over the sewers, although he still retains the technical ownership of the soil of the streets.
5. A person is liable only for that damage which is the direct and proximate result of his acts. Therefore where a sewer is not of *itself* a nuisance, the owner or builder is not liable because a nuisance is created by an improper use of it by others, and over which he has no control.
6. *Sentle*. It might be otherwise if in granting an easement in the sewer he had warranted to the grantee the right to make such improper use of it, or having retained control over, had knowingly permitted such use.

MOTION for new trial on exceptions.

THE CASE is stated in the opinion.

ELLIOTT & ROBINSON for plaintiff.

An action for nuisance lies for him that is hurt by it; it lies against those concerned in erecting it, and those who

continue it; it lies against the author of the nuisance, although he has no interest in the property on which it exists, or having once had such interest, has parted with it. *Thompson vs. Gibson*, 7 M. & W., 456; *Roswell vs. Prior*, 12 Mod., 639. One is not permitted to transfer his wrong over to another, so as to discharge himself. It is not necessary in an action of this nature that a person charged with erecting the nuisance should be the owner of the freehold, or any part of it upon which the nuisance is erected; it is sufficient if he is a party to the erection of such nuisance, and the disposition subsequently of his interest in the erection constituting the nuisance will not defeat an action for damages arising from such nuisance erected by him. *Dorman vs. Ames*, 12 Minn., 451. He who erects a nuisance continues liable as long as the nuisance continues. * * * It would be very difficult to find a good reason why the original wrong-doer should be discharged by conveying the land. The injury has no connection with the ownership of the land." *Plumer vs. Harper*, 3 N. H., 88; *Eastman vs. Company*, 44 Id., 144; *Custice vs. Thompson*, 19 Id., 478; *Staple vs. Spring*, 10 Mass., 72. The fact that the defendant cannot enter to abate the nuisance does not excuse his liability, for it is his own wrong which has involved him in trouble. *Smith vs. Elliott*, 9 Pa. St., 345; *Thompson vs. Gibson*, 7 M. & W., 456. Where one has erected no nuisance, and himself been guilty of none, it has been held that, if he demised his property for the purpose of having it used in such a way as must prove offensive to others, he might himself be treated as the author of the mischief. *Fish vs. Dodge*, 4 Denio, 317; and see *Cahill vs. Eastman*, 18 Minn., 824.

It is not necessary, then, to set up defendant's title to the property upon which the nuisance exists. *Cheetham vs. Hampson*, 4 T. R., 318; *Chenango, &c., vs. Lewis*, 63 Barb., 111.

The rule is, that every person who constructs a drain or cess-pool upon his premises and uses it for his purposes, is bound to keep the filth collecting there from becoming a

nuisance to his neighbors. *Marshall vs. Cohen*, 44 Ga., 324; *Wommersley vs. Church*, 17 L. T. (N. S.), 190; *Cook vs. Montague*, 26 Id., 471; *Draper vs. Sheering*, 4 L. T. (N. S.), 865; *Rex vs. Pedley*, Ad. and El., 822; *Ball vs. Nye*, 99 Mass., 582; *Tenant vs. Golding*, 1 Salk., 360; *Bellows vs. Sacket*, 15 Barb., 96.

A. S. WORTHINGTON for defendants :

1. The notice of the health officer was admitted as evidence of the existence of a nuisance. This notice was the result of an *ex parte* investigation by an agent of the health officer, and as to this suit it was plainly *res inter alios acta*.

2. It is well settled that a man is not liable for a nuisance created on his land by another, where the land-owner is not in privity with the wrong-doer. The cases on this subject are collected in *Wood on Nuisances*, sec. 820. And see the leading case of *Russell vs. Shenton*, 48 E. C. L. R. See, also, *Sanby vs. R. R. Co.*, 4 L. R. C. P., 640; *People vs. Townsend*, 3 Hill, 479; 2 Rob. Pr., 676, 677.

It is believed that no case can be found in which a defendant has been held liable for a nuisance created on his premises by somebody else. A nuisance so created, those who suffer from it may abate. The public may abate it. The land-owner may, too; but he is not bound to do it.

But in this case the sewers in Le Droit Park, the mere existence of which was made the ground of defendant's liability by the court below, are not a nuisance in themselves. It is the putting of filth into the stream that runs through the pipes, that causes the alleged nuisance. Who does that? A hundred people in the University grounds, and many persons in Le Droit Park, who built their own houses on their own land. And yet the court said to the jury that if the defendants laid the pipes, they are to be held for all the filth that passes through them.

We confess that as to this error we have found no case in point. We doubt whether such an instruction was ever before asked. A question somewhat similar has arisen under the landlord and tenant law, where the *use* by the tenant of

something on the demised premises has resulted in a nuisance. For instance, in *Rich vs. Basterfield*, 56 E. C. L. R., 788, a chimney was built by the landlord, and its use by the tenant proved to be a nuisance. The person injured sued the landlord, but it was held that he was not liable. The chimney hurt nobody till fires were built in it, and that was the act of the tenant, not the landlord. To the same effect is *Simpson vs. Simpson*, 1 C. B., 347. This distinction between a structure which is a nuisance and one the use of which creates a nuisance, was entirely overlooked at the trial. Yet it runs through the law of nuisance everywhere. If a building be used as a slaughter-house, and by polluting a stream near by prove to be a nuisance, a court of equity will enjoin the use of the structure for that purpose, but will not tear it down. Wood on Nuisances, section 814. See also sections 789, 790, 815.

Mr. Justice Cox delivered the opinion of the court.

This is an action brought by George E. Moore, the owner of a certain tract of land on the outskirts of the city, against the defendants, Langdon & Barber, for an alleged nuisance. The substantial allegations are that at the time of the commencement of this action the defendants were in possession of a certain tract of land adjoining that of the plaintiff, known as Le Droit Park, that they had laid down certain main sewers in that park, through which were carried, large quantities of impure water, sewage, &c., which collected upon the premises of the defendants and thence flowed over the land of the plaintiff, making a marsh, preventing the comfortable occupation of his house and premises, and injuring the pasture of his cattle.

The first question was as to the fact of nuisance, and the first exception taken on the part of the defence was to the admission of evidence supposed to be offered as tending to prove that fact. The evidence objected to, and to the admission of which this exception was taken, is a notice addressed by Dr. Townshend, the health officer of the District, to the defendants, in the following language:

“WASHINGTON, D. C., August 2, 1878.

“TO A. L. BARBER & Co.,

“SIRS : There is a nuisance on your premises, Le Droit Park, consisting of contents of sewer emptying on to adjoining premises, which has become offensive and injurious to health. You are hereby required to cause said nuisance to be abated within ten days after date of service of this notice ; otherwise you will be proceeded against agreeably to law and the health ordinances of the District of Columbia, in such case made and provided.

“SMITH TOWNSHEND, M. D.,
Health Officer.”

The fact seems to have been, that a sanitary inspector examined these premises on two occasions, and on his report this notice was served.

On the part of the plaintiff it is maintained that this evidence was competent at least for one purpose, that is, to show that the defendant had full notice of the existence of the nuisance, so that their persistence in maintaining it after due notice might be held to furnish a ground for exemplary damages. The evidence, however, was not offered professedly for that purpose, nor did the court limit its effect to that result. On the contrary, the court told the jury that there was no case at all for exemplary damages ; but the evidence was admitted on the general issue of guilty or not guilty as to the nuisance ; and the question is whether it is competent evidence tending to prove the affirmative of that issue—the existence of the nuisance. Now this letter from the Health Officer to the defendants is simply a statement or declaration, as to the fact, by a third person. It is undoubtedly hearsay testimony. If it is to be regarded as an official proceeding, it was *res inter alios* and incompetent testimony as between these parties ; and, treated as a declaration, it is, of course, the purest hearsay. In other words, it simply shows that the health officer said that there was a nuisance on these premises. And this is not all that is objectionable in it ; for the health officer does not make the

statement from his own personal knowledge, but from information received from somebody else—his inspector. Therefore, this letter merely shows that the health officer said that somebody else said that there was a nuisance on these premises. And even this is not all that is objectionable in the character of this testimony; for the letter of the health officer gives notice of the existence of a *public nuisance on the premises of the defendants*; while it is offered as evidence of the existence of a private nuisance on the premises of the plaintiff. Now, there might be a public nuisance on the defendants' premises without the existence of any private nuisance as to the plaintiff, and a public nuisance would afford no ground for an action by the plaintiff, unless it was a private nuisance also. We are unable to see any ground upon which this evidence could have been properly admitted, and as it was calculated to exercise a decided influence upon the minds of the jury, for this reason if for no other, we think the verdict ought to be set aside.

I proceed to state the views of the court as to some of the other questions that arise in the case.

The allegation is that the defendants were in possession and occupation of the premises and that they, the defendants, through these sewers, discharged this offensive matter on the plaintiff's premises. There is no evidence in point of fact that the defendants were in possession of the premises at all. On the contrary, the fact seems to be admitted that the property had been divided up into lots and sold to different parties, and that a large number of houses had been erected on those lots by the purchasers, who had connected their houses by drains with these main sewers, and that *they* were engaged in discharging this offensive matter through these drains and sewers. There was offered in evidence a memorandum on the record of the subdivision of this tract of land, purporting to be signed by the defendants, to the effect that they retained ownership and control of the streets; but, assuming that to be competent evidence, the ownership retained was simply the kind of ownership which the common law contemplates, that is, ownership of the

soil, subject to the easements that had been given to the purchasers of the lots. The streets had been laid out and these sewers constructed and houses erected and sold with reference to these easements, and the defendants thereafter had no more right of ownership or control over the sewers than over the houses themselves. They had simply a technical ownership of the soil subject to these easements. It may be held, therefore, that the defendants had entirely parted with the use and control of these sewers; and, consequently, the case is not complicated by the question of ownership and control of the sewers by the defendants at the time this action was brought. The real question here—a very serious and difficult one—is, how far the defendants, having constructed these main sewers and afterwards parted with the ownership of the property, are responsible in law for a nuisance created by the subsequent use of those sewers by other parties. I think that, taking the most liberal view of the plaintiff's rights, the utmost he could claim would be that the defendants should be responsible for the use of these sewers by the parties for whose use they were intended; but the court below went further. It appeared in evidence that another class of people, occupying a distinct property, namely, the Howard University grounds, had made connection with these sewers. This appears from a portion of the testimony which is set forth in the record :

“Question. That sewer takes all the surface water and all the filth about Howard University grounds, does it not?
Answer. Yes, sir; it is what was there before.

“Q. Will you tell the jury that any night-soil in any quantity, ever passed over Mr. Moore's place, before the construction of this sewer? A. Yes, sir; from the Howard University.

“Q. From what property? A. From pig-pens and from outhouses; they have no sewerage there in the University grounds, and they have to use a surface sewer; they run it all into this drain.

“Q. Did they deposit night-soil on the surface; was it not in boxes? A. It was in boxes, but they were oozing over.”

So the evidence tended to show that the night-soil from the Howard University grounds enters into these drains and passes through this sewer also, and from the language of the court below, it would seem that the defendants were held liable for that. The language of the court was :

"If the jury are satisfied that you [the defendants] laid the pipes there, and discharged upon the plaintiff's premises offensive matter, you are liable for all the injury which they have done in the shape of a nuisance to Mr. Moore's land."

"Mr. WORTHINGTON ; That is not the precise point. Are they liable for the acts of persons who subsequently built houses there ?

"THE COURT : For the whole matter that passes through the pipes and finds a lodgement upon the premises of the plaintiff."

Now, that left it to the jury—perhaps not very distinctly, but still it left it open to them—to infer that the defendants would be liable for a nuisance resulting from this offensive matter coming from the Howard University grounds. Even if the court were right in thinking that the defendants were responsible for the acts of householders in Le Droit Park, they failed to discriminate between their responsibility for that and their responsibility for the acts of other parties outside ; and in that way injury may have been done to the case of the defendants.

But there remains another very interesting question, viz., whether, for the acts of these people in Le Droit Park, who used these sewers, the defendants, who sold them the property, are responsible ?

This question is not free from difficulty : Indeed, it is a very difficult one. There is an apparent discrepancy in the authorities. There is, however, a principle in the law of torts by which, we think, this question may be determined and the authorities reconciled. The principle is, that a person is only responsible for that damage which results proximately and directly from his acts. If it is sought to make a party responsible for a given injury, the question is whether his act is the direct and proximate cause of the injury. If

it is, he is responsible. If, however, other independent agencies and volitions have intervened between his act and the result complained of, and his act is only a remote cause of the result, then he is not responsible. Hence, some of the best considered cases draw a distinction between those things which are nuisances *per se*, and those which only become nuisances by the use made of them. They hold, for instance, that if a man creates a structure which is itself a nuisance, without the intervention of the acts of other parties, he is responsible for the consequences, whether the nuisance be erected on his own land, which is afterwards sold to somebody else, or erected in the first instance on the land of another party; but if the structure is of itself innocuous, and the nuisance arises from the use made of it subsequently by the agency of other parties, entirely optional with them, then the author of the erection is not responsible, unless he is in some way connected with the use which makes the nuisance. For example, there is cited the case of a tunnel constructed on an island in the middle of a river, so constructed that at a certain stage of the tide, or of a freshet, the whole structure collapsed of itself, without the act of any third party, and the water rushed in and damaged the property of the plaintiff. There was no evidence of anybody else's agency in making this nuisance; the very thing created by the defendant was shown to be of itself a nuisance, and his act was deemed to be the proximate cause of the nuisance, although the damage occurred some time after the erection was made by the defendant. Other cases have been cited in which landlords have been held responsible for nuisances on premises leased by them for trades which were themselves noxious, and landlords have been held responsible upon the ground that they were receiving profit from such use of the property, and were, therefore, connected with the use constituting the nuisance. In other cases, where a person has conveyed property with a general warranty, it has been held that he was responsible for the use. A very complete discussion of this subject is found in the case of *Rich vs. Basterfield*, 56 English Common Law Reports, 783. In that case the land-

lord built a chimney, which of itself hurt nobody until the fires were built in it. The tenant took possession and made his fires, and the smoke from the chimney became a nuisance. The court reviewed the decisions up to that time and discussed them with great ability, and took the broad distinction between things which are nuisances in themselves, and things which only become nuisances by the use that is made of them, and held that in that case the landlord was not responsible, because his act was not the proximate cause of the injury complained of.

Now, to apply this principle to the present case, here was a park laid out in building lots for suburban residences—not city lots, but large lots such as are commonly laid out and built upon in the suburbs of cities. The purchasers of these lots were not bound to connect their premises at all with these sewers. It was optional with them whether they would introduce the Potomac water into their houses, or whether they would use the outhouses which are commonly used in suburban places and villages. They chose, however, to introduce the water, and to make these connections with the sewer, without which there could have been no nuisance from that source. They chose to introduce the water of the Potomac river into their houses, and to use these drains and sewers to convey away offensive matters. But for their active agency in promoting these results there would have been no nuisance. The act of the defendants in the first instance in laying out the sewers, if it was a cause at all, was a remote cause, and it does not seem that they should be held responsible for consequences resulting from the intervention of other persons. If this be the correct view of the law, the action could not be maintained upon the facts set forth in this bill of exceptions; though other facts may put a different complexion upon the case. As, for instance, if the defendants had warranted the right to use the pipes to the lot-holders, or still retained control over them, and knowingly permitted them to be used offensively, &c., or other equivalent facts which would connect them directly with the use complained of.

A new trial is therefore granted.

SAMUEL J. ANDREWS

vs.

THE CAPITOL, NORTH O STREET AND SOUTH WASHINGTON
R. R. Co.

AT LAW. No. 16,505.

{ Decided December 2, 1882.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. Where there is abundant standing room inside of a street car, in which there are pendent straps which a passenger may hold while standing, he is guilty of contributory negligence who rides upon the platform, and if an injury result to him, which would not have occurred had he been in the inside of the car, he cannot maintain an action for such injury.
2. In an action to recover damages for injuries sustained while riding on the platform of a street car, the court will presume, in the absence of evidence to the contrary, that the car was a good one.

STATEMENT OF THE CASE.

MOTION for judgment on the following special verdict :

" We, the jury, duly impanelled and sworn to try the issue joined in the above entitled cause, find the following to be the facts in the case, as made by the plaintiff and defendant, to wit :

" The defendant is a corporation created by act of Congress, operating a street railroad in the city of Washington.

" On the evening of the 20th of August, 1876, the plaintiff hailed one of the defendant's cars, which, answering his call, stopped on the corner of Twelfth and E streets, northwest, in the city of Washington. The plaintiff stepped upon the rear platform, where he stood a few seconds, and then advancing to the door, which was open, looked in, as though searching for a seat, but seeing none he stepped back on the platform. The car continuing its course east on E street, the driver rang his bell to remind the plaintiff of his fare. He thereupon commenced feeling in his vest pockets for it, and having found it stepped forward, and had one foot within the car. He had hold of the jam of the door with one hand and held his fare in the other, and while hesitating whether to pass up his fare or to go forward with it himself, the car struck the curve at the corner of Eleventh

and E streets, where the road changes its course from east to north, producing a jar, which caused the plaintiff to be thrown backwards upon the railing of the rear platform, and from thence to the ground, and so seriously injured as to be permanently disabled. The car, at the time of the accident, was going at a medium rate of speed, which was not slackened at the curve.

"The cars upon the defendant's road, like those of most other roads in this city, have no conductors or agents inside the car to collect the fares. The driver has exclusive control of the car, but is not allowed to receive fares, and the passengers are required to deposit their fares in a box at the front end of the car.

"The plaintiff had frequently ridden upon the defendant's cars, and was familiar with the streets where the accident occurred. The car was from twenty to thirty seconds in going from where the plaintiff got aboard to the curve.

"The seats inside were all comfortably filled, so that the plaintiff could not have gotten a seat, without room had been made for him by the passengers sitting closer together. With the exception of one white lady and gentleman, the passengers were all colored persons. They were orderly and well behaved.

"There was plenty of room for the plaintiff to have stood in the aisle of the car, and there were straps pendent from the roof, or from rods running lengthwise of the car near the roof, which were intended for standing passengers to hold on to.

"There were no standing passengers inside the car. The driver knew that the plaintiff was riding on the platform, and made no objection to it. Passengers sometimes rode upon the platforms of the defendant's cars, and no objection was ever made to it by any one of the officers or agents of the company. After this accident the defendant caused the rear platform to be removed from all their cars and substituted a single step to enable passengers to get into and out of the cars. The former platforms were the same as are usually attached to street cars, and were designed only for

the convenience of passengers in entering and leaving the cars. No person inside the car was injured at the time of the accident to the plaintiff.

"The foregoing facts considered, we, the jury, say that we are ignorant in point of law on which side we ought to find the issue; and if upon the whole matter the court shall be of opinion that the issue is proved for the plaintiff, we find for the plaintiff accordingly, and assess his damages at twenty-six hundred dollars besides costs; but if the court be of an opposite opinion, then we find for the defendant."

Under the 99th rule of court the plaintiff moved the court in General Term for judgment on this special verdict.

S. S. HENKLE for plaintiff:

It is settled by the special verdict, that the car striking the curve *produced a jar*, which caused the plaintiff to be thrown off and consequently injured; and the permanent injury shows that the force which threw him off must have been violent. It is perfectly certain if the driver had slackened the speed of his horse at the curve to a walk, the accident would not have occurred. Is there any escape from the conclusion that the failure of the driver to slacken his speed at the curve was negligence? In *Stokes vs. Saltenstall*, 13 Pet., 190, the Supreme Court of the United States says: "But although he (the carrier) does not warrant the safety of the passengers at all events, yet his undertaking and liability go to this extent, that he or his agent, if as in this case, he acts by agent, shall possess competent skill; and that, as far as human care and foresight can go, he will transport them safely." The suit was against the proprietors of a stage coach for an injury to a passenger. And the doctrine of this case has been followed in all the cases. *Peck vs. Neil*, 3 McLean, 22; *Muer vs. Penn. R. R. Co.*, 64 Penn. St. R., 225; *Shearman & Redfield on Negligence*, Sec. 266, and cases cited.

Is the defendant chargeable with contributory negligence? If not he is clearly entitled to a judgment.

I maintain that it is not contributory negligence for a

passenger upon a street car to ride upon the rear platform, if there are no vacant seats inside the car, and he is there by the permission or with the knowledge of the agent of the company, who makes no objection to it.

In the case of *Messel vs. Lynn & Boston R. R. Co.*, 8 Allen, 234, the plaintiff was injured while riding upon the front platform of a street car. The car was full, and he was told to go upon the platform by the conductor. The driver accelerated his speed in turning a curve, and the plaintiff was thrown off and injured; held that it is not necessarily unsafe to ride upon the front platform of a street car, and the plaintiff was not bound to know that the driver would go fast around the curve. He should have slackened his speed, and not doing so was negligence, and standing on the platform was not contributory negligence. And see to same effect, *Spofford vs. Harlow*, 3 Allen, 176; *Burns vs. Bellefontaine R. R. Co.*, 50 Mo., 139; *Germantown R. R. Co. vs. Walling*, 97 Pa. St., 55; *Maguire vs. Middlesex R. R. Co.*, 115 Mass., 239; *Spooner vs. Brooklyn City R. R. Co.*, 54 N. Y., 280. The foregoing are all cases of injuries to passengers upon cars and other vehicles drawn by horses. The following are cases of injuries to passengers upon cars drawn by steam: *Edgerton vs. N. Y. & Har. R. R. Co.*, 39 N. Y., 227; *Congrove vs. Harlem R. R. Co.*, 6 Duer, 382; *Willis vs. Long Island R. R. Co.*, 34 N. Y., 670; *Zemp vs. W. & M. R. R. Co.*, 9 Rich. Law, (S. C.), 84.

The doctrine deduced from the cases is—

1st. That riding upon the platform of either a horse or a steam car is not *per se* negligence, but is a question for a jury.

2d. That riding upon the platform of a horse car certainly, by the permission or with the knowledge and without objection of the agent of the company in charge of the car, is not negligence.

3d. That it is the duty of a railroad company to furnish its passengers seats within the car, and if it does not a passenger may ride upon the platform, and if injured by the negli-

gence of the carrier while so doing, this fact is not available in defence as contributory negligence.

4th. Although the company may provide pendent straps from the roof of the car for passengers standing in the aisle to hold on to, the company cannot require, and should not permit, passengers to stand in the aisle, as the other passengers have a right to have the aisle kept open and unobstructed.

5th. As a matter of fact the rear platform of a horse car is not ordinarily a place of any more danger than the inside of the car, and it only becomes so when overcrowded, or by the negligence or misconduct of the driver.

6th. The railroad companies give the public to understand that the platforms of their cars are safe places to ride upon, and habitually stop for passengers and invite them to get on so long as there is standing room upon the platform or steps, and it would be strange indeed, if, when a passenger is injured while riding upon the platform, by the negligence of the company, it should be permitted to set up this fact as contributory negligence.

In this case the seats were all full. The driver knew this, and yet stopped for the plaintiff to get on. He knew he was riding upon the platform and made no objection to it. They were in the habit of carrying passengers upon their platforms. Upon these facts how can the defendant escape liability?

It may be said that the plaintiff knew the streets and should have looked out for the curve. The reply is, that the plaintiff had a right to rely upon the prudence and care of the driver, and it was not his duty to anticipate that he would go whirling round the curve at such speed as to throw him off.

HINE & THOMAS for defendant :

The plaintiff predicates his right to recover against defendant in this action upon the carelessness, negligence, and unskillfulness of defendant's driver—the bad condition of the track where the accident occurred, and the absence of negli-

gence or want of care on his part. The special verdict is singularly silent on the question of the driver's unskillfulness and the bad condition of the track. The findings do not even inferentially show that defendant's track was in any worse condition at the point where the accident occurred than the curve necessarily made it. May we not, therefore, assume that the driver was careful and skillful, and that the track was in good condition? The averment of the declaration is: "That by reason of the carelessness, negligence, and unskillfulness of the driver, and the bad condition of the railway at or near the corner of E and Twelfth streets, and without any carelessness or negligence on his part, he (the plaintiff) was with great violence thrown from said car," &c. These were certainly conditions most material to the plaintiff's right to recover—their absence from the findings of the special verdict is not to be accounted for on any other hypothesis than that they were not true.

It does appear that the plaintiff had frequently ridden upon defendant's cars, and was familiar with the street where the accident occurred. May we not add, and was used to street car travel generally, and knew of the curve in the track of defendant's road at the corner of Eleventh and E streets, and that common observation had taught him that it was peculiarly dangerous to stand on the outside platform of a street car when it was rounding a curve?

The special verdict shows clearly that the plaintiff would have sustained no injury had he remained inside the car. His conduct was such that he could not recover had he received like injuries while traveling on a steam railway. Certainly, then, he cannot recover for injuries received, as in this case, on a street railway where the cars are drawn by horses, and the incidental dangers are few compared to the other mode of travel.

By voluntarily taking a stand and remaining on the outside platform of the car while it was in motion and rounding a curve, when there was plenty of room for him to have stood on the inside, the plaintiff committed such a flagrant act of contributory negligence as disentitles him to recover

for the injuries he sustained. He must charge his injuries to his own want of care.

"The rule is without exception," says Mr. Redfield in his note to *McClurgs' Case* (56 Pa., 294), 2 Am. Ry. Cases, 552, "in all the well considered cases, that the plaintiff cannot recover for any damages he may sustain where his own want of ordinary care contributed directly towards it, however great or extreme may have been the negligence on the part of the defendant."

See the case of the *Railroad Co. vs. Jones* (5 Otto, 439), which was a much stronger case in every particular than this. And see, also, *Hickey vs. Boston & Lowell R. R. Co.*, 14 Allen (Mass.), 429; *Todd vs. Old Colony R. R. Co.*, 3 Id., 18; *Gaverett vs. M. & L. R. R. Co.*, 16 Gray (Mass.), 501; *Lucas vs. N. B. & T. R. R. Co.*, 6 Id., 64; *Ward vs. R. R. Co.*, 2 Abb. (N. Y.) Pr. N. S., 411; *Galena & Chicago Union R. R. Co. vs. Yarwood*, 15 Ill., 468; *Doggett vs. Illinois Central R. R. Co.*, 34 Iowa, 284; *Pittsburg & Connellsville R. R. Co. vs. Andrews*, 39 Md., 329; *Geis' Case*, 31 Md., 266; *Pittsburg & Connellsville R. R. vs. McClurg*, 56 Pa. State, 294; *Penna. R. R. Co. vs. Zebe and Wife*, 9 Casey, 218.

Mr. Chief Justice CARTER delivered the opinion of the court :

The plaintiff brings this suit to recover damages for injuries received by reason of being thrown from the rear platform of the car of the defendant, a street railroad company. By a special verdict of a jury, the extent of his damages are fixed at \$2,600, and he is entitled to recover this, provided the facts in the case form the predicate of action.

The declaration charges, in substance, that the defendant corporation, in its carelessness and through the heedlessness of its driver, and by reason of insufficient facilities for carrying passengers safely, caused this injury, and that the plaintiff made no contribution to this accident.

The allegations of the declaration are denied by the defendant, and, issue being joined we are invited to a consideration of the law governing the facts of the case as set forth in the

special verdict. The verdict shows that the car was travelling at ordinary speed in the ordinary way. There is nothing reflecting upon the skill of the driver, or attributing fault on his part. The statement of facts also advises the court that the car was a good one, for in default of proof to the contrary it will be presumed to have been so. Now we are admonished by authority, that while public carriers are chargeable with strict care and circumspection in the preservation of the safety of passengers, they are not insurers in any event of the passenger's life and limbs. Here is a car travelling at an ordinary rate of speed, a good car, with a good driver, and, unless the law underwrites the life and safety of every passenger riding on a railroad car, these facts constitute a full answer to the plaintiff. The law does not contemplate that these corporations shall take the keeping of a man's discretion into their hands. If the plaintiff saw fit, under the facts found in this verdict, to stand on the platform, he took with him the perils of the platform, and cannot recover.

The judgment, therefore, must be for the defendant.

Mr. Justice JAMES said :

I desire to add a word as to the defendants' part in this case. I concur with the view that the plaintiff was responsible, or rather that he lost his right of action by contributing to the result ; but I have not the least doubt that the defendant company was in fault. The special verdict found as a fact that the car was going around a curve at the same speed at which they ordinarily travel in a straight line. That is too fast to go around a curve, but it is said to be necessary from the construction of the car and from the fact that they have to go around pretty rapidly with one horse ; so that the rapid speed which they keep up in rounding a curve is largely attributable to the arrangement which they have chosen to make so as to use only one horse. I think, therefore, that the defendant was also in fault ; but the plaintiff ought not to recover when his own act contributed to the accident. It is for this reason that I concur in the judgment.

JOHN B. HAMMOND vs. JAMES E. MILLER.

LAW. No. 21,785.

{ Decided December 18, 1882.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. Where one partly performs his contract and then refuses to complete it, he has no right of action upon the contract even for the work already done; his rights under it are gone when he abandons it, and the other party has a right to treat it at once as at an end.
- Quære*, whether the acceptance of the work partially performed, even when the acceptance cannot be avoided, does not raise an implied assumpsit to pay the reasonable value of the work so accepted.
2. But in the case of an uncompleted contract to build a house, when the work already done has been paid for, the owner has the right immediately upon the default to take possession of the unfinished building and finish it himself, or employ others to do so, and under no such circumstances can the original contractor have a claim upon the owner of the land for any saving effected on the original contract price in the completion of the building.
3. Under a building contract, M., the owner, had full power, in case of the default of the contractors, B. & C., to finish the houses at their cost, and to deduct the same from any money owing them at the time of default. B. & C. defaulted, having been paid for all work done to date. The completion of the houses was then undertaken by M., and effected at a less cost than the original contract price. It was argued that this completion was, under the terms of the contract, a completion by M. as agent of B. & C., and on their account, and hence B. & C. were entitled to the saving made on the contract price.
- Held*, That it was optional with M. to complete the contract on B. & C.'s account, or to treat it as wholly rescinded, and finish the houses for his own benefit; that having elected the latter, the saving was his own, and not B. & C.'s. But, *quære*, if money sufficient to finish the work and belonging to B. & C. had been in M.'s hands, would the work finished by M. be work done with the money of B. & C., and, in contemplation of law, *their* work, so as to entitle them to any saving on the contract price made by M.?
4. *Seemle*, If M. accept an order of B. & C. in favor of H., payable out of whatever will be due B. & C. on the completion of their contract, and afterwards advances to B. & C. money that was due *only on such completion*, he will be liable to H. for as much as was thus paid away to the latter's prejudice.

MOTION for new trial on exceptions.

THE CASE is stated in the opinion.

ELLIOTT & ROBINSON for plaintiff.

CARUSI, MILLER & SANDS for defendant.

Mr. Justice COX delivered the opinion of the court.

On the 3rd of July, 1879, a contract was made between William Lawson and William H. Hazle on the one part, and James E. Miller on the other, that the firm of Lawson &

Hazle were to erect three houses for Miller on a lot of ground owned by him, at an aggregate cost of \$8,499. The price was to be paid in seven different instalments, the last instalment when the houses were completed and the keys turned over to defendant Miller; with this exception, that 25 per cent. was to be reserved from each instalment and retained by Miller until thirty days after the dwelling-houses should have been completed and the keys of the same turned over by Lawson & Hazle, or their representatives, to him. The houses were to be completed in four months; that is, by the third of November; and it was stipulated that if the contractors should fail to complete them within the four months, Miller should have the right to charge them \$50 for each week of delay in the completion. It was further stipulated that if the contractors should fail to finish the houses within a period of *five* months from the execution of the contract, Miller should have "full power and authority to employ other person or persons to finish and complete the said dwelling-houses or residences, at the cost and expense of the said Lawson & Hazle, their executors, &c.; which cost will and can be deducted by said Miller from any money which may be in his possession at the time of said failure" on the part of Lawson & Hazle to complete the dwelling-houses, &c.

Lawson & Hazle employed this plaintiff, John B. Hammond, as sub-contractor, to furnish certain materials, doors, windows, blinds, &c., but Hammond was unwilling to deliver these materials on the credit of Lawson & Hazle only, and required an order upon the defendant, the owner of the ground, and the acceptance of such order by him before he would deliver the materials. Accordingly, Lawson & Hazle made this order :

"SIR : You will please pay John B. Hammond for materials for your three houses, which we are erecting for you, &c., * * * the sum of \$796.54, and deduct the same out of payment which will be due us on the completion of said houses."

On the paper was written : "This order is hereby accepted,

payable when Messrs. Lawson & Hazle complete the three houses herein stated ; that is, per contract. James E. Miller."

Lawson & Hazle failed to complete the houses by the third of November, and thirty days more time was given them. They failed to complete them by that time, and after having done perhaps three-fourths of the work, they formally abandoned the contract and refused to complete the houses. The defendant, Miller, after importuning them to go on with the work, and calling upon the plaintiff also, in his own interest, to prevail upon them to complete the houses, seems to have acted upon the assumption that there was no more to be expected from them, and to have taken possession of the houses. Having taken possession, he entered into new contracts in his own name with other parties and went on to finish the houses at his own expense. At the time when Lawson & Hazle formally refused to go on with the work, Miller had paid them all that was due them for the work already done, and a little over, including even the 25 per cent. which, by the contract, he had been entitled to reserve ; so that at that time he owed them nothing. As I have said, he then proceeded to finish the houses himself, under new contracts with other persons. In making these new contracts, he effected a saving, upon the price stipulated in the original contract, of \$382.19 ; that is, he got the work done for so much less than Lawson & Hazle would have been entitled to if they had done the work under their contract.

Then this plaintiff, Hammond, the sub-contractor, sued Miller upon this accepted order, calling it a bill of exchange, and included in his declaration the common counts. At the trial below, several exceptions were taken to the ruling of the court, but the most important one relates to the last instruction which the judge gave the jury, to return a verdict in favor of the plaintiff for the sum of \$382.19, the amount found in the defendant's hands after he had completed the houses. To that instruction of the court the defendant excepted. Now, in giving this instruction, the court below

clearly proceeded upon the theory that when the defendant took possession of the unfinished houses and completed them, he did so in the interest of the defaulting contractors and substantially as their agent, and that the defaulting contractors, being chargeable with the cost of building the houses, were entitled to credit for the balance of the contract price. This leads us to consider what are the rights of a contractor who has partly performed his contract and then refuses to complete it. We speak now in the first instance of his rights at common law independent of any special provision such as is contained in this contract, and is relied upon particularly by the plaintiff. It is perfectly well settled at common law that if a man partly performs his contract and then refuses to complete it, he has no right of action upon the contract even for the work which has been done. The later authorities go further than that. For instance, the rule is laid down in 2 Smith's Leading Cases, (Am. Ed. Hare's Notes, p. 25), in comments upon the case of *Cutter vs. Powell*: "But if there has been an entire executory contract, and the plaintiff has performed a part of it, and then wilfully refuses, without legal excuse and against the defendant's consent, to perform the rest, he can recover nothing, either in general or special assumpsit."

But there are cases which hold that where the work has been partially performed and is accepted even under compulsion, that is, where it cannot be avoided by the other party, that fact alone raises an implied assumpsit to pay the reasonable value of the work which has been so accepted and used. But it is perfectly clear that even if the party can recover upon the contract for work which is already done, he cannot recover upon the contract for work which he did not do and which he refused to do. His rights under the contract are gone when he abandons it, and the other party has a right to treat it at once as at an end. In this case the owner had paid for all the work that had been done. He had the right, immediately upon the default of the contractors, to take possession of the unfinished houses, as he did take possession of them, and to finish them if he pleased, or

to sell them to somebody else, or to employ other persons to do the work which the contractors had been engaged to do and had refused to do. Under no such circumstances can it be conceived that the contractors so in default could have a claim upon the owner of the land. They certainly could not sue upon an implied assumpsit for work which had been done by other people. They certainly could not sue upon the contract, because they would have been compelled either to aver and prove that they had performed the contract, or to aver a readiness to perform it, and that they were prevented from doing so by the other party. The only theory under which a right of that kind could be maintained by the contractors against the owner would be that, although they had repudiated the obligation of the contract, they still retained the benefit of the contract ; that although they refused to do the work they still had the right to do it, and that nobody else could do it except in subjection to them and as their agent, and that the owner of the ground could not rescind the contract, notwithstanding the refusal of the contractors to complete it ; all which conclusions are in our opinion so heterodox that they do not need any discussion.

But in this particular case reliance is placed upon this peculiar clause in the contract as modifying the common law rights of the parties : "The said Miller shall have full power and authority to employ other person or persons to finish and complete said dwelling-houses at the cost and expense of said Lawson & Hazle ; which cost or expense will and can be deducted by said Miller from any money which may be in his possession at the time of said failure on the part of said Lawson & Hazle to complete and finish said dwelling-houses."

It is argued that when the houses were completed by the owner, it was substantially, under the terms of the contract, a completion by him as the agent of the contractors and on their account, and that therefore they are entitled to credit for the contract price, while they are to be charged simply with the cost of completion. It is to be observed in the first place, that the language of this contract does not make it

the *duty* of the owner to pursue this course, but simply provides that he shall have power and authority to do so. We do not understand that this takes away from him the right to resort to his common law right to rescind the contract, ignore the contractors, and proceed to finish the houses on his own account ; but simply that this power is given to him to secure the completion of the contract by the contractors, if he chooses to resort to it. And the operation of it is simply this: In the absence of this provision in the contract, the contractors, after finishing a large part of the work and then declining to complete it, might say to the defendant : "The 25 per cent. which you have in your hands, reserved from the several instalments, is our money; we have earned it by work already done, and you have no right to apply it to anything else." To which the owner might answer : "But, by the terms of this contract, you engaged to do certain work which you have not done, and under the contract I am entitled to apply your money, now in my hands, to the completion of the work." This, I think, was unquestionably the object of this provision, and, as we have said, it left it optional with the owner, whether he would resort to this means of completing the work, or would treat the contract as wholly rescinded and proceed to have the work done upon his own responsibility and for his own benefit. A case in New York is cited which is supposed to be analogous to the present one, the case of *Murphy vs. Buckman* 66 N. Y., 297. The contract in that case was a building contract and it provided in reference to the contractor, that should he at any time during the progress of the work refuse or neglect to supply sufficient materials or workmen, the owner should be at liberty to provide materials and workmen, after three days' notice in writing being given, to finish said work ; and the amount should be deducted from the amount in the contract.

In that case the contractor having been delinquent in supplying materials and workmen, the owner gave him the notice provided for in the contract, and, upon the continued delinquency of the contractor, the owner furnished the needed

materials and workmen, and after the completion of the work, when the cost of completion was deducted from the contract price, there was found to remain in his hands a considerable sum of money which it was held that the contractor was entitled to recover. The court said that the defendant, by electing to go on under the clause of the contract to which I have called attention, waived his right to insist upon a forfeiture for the failure of the contractor. The owner was not precluded from claiming damages thereafter from the contractor for defective performance, or from a suit to recoup himself for work done under the contract ; but he could not avail him of the right given him by the contract to go on and complete the work, and then refuse to account to the contractor upon the ground that the contract was forfeited ; for, the court say, "the election to do the work at the contractor's expense under the clause referred to, assumed that the contract was then in force."

There are two features in which this case differs from that at bar. In the first place, in the New York case, the stipulation was that the owner might, upon giving due notice to the contractor, complete the house at the contractor's expense and deduct such expense from the contract price ; which by necessary implication assumes that the balance of the contract price is still the property of the contractor, and that the work is done in pursuance of the contract, the owner substituting himself for the contractor in the work ; and the owner having done that, it did not lie in his mouth to say that the contract was not in existence and the contractor not entitled to the balance remaining after the work was done. In the present case the stipulation is not that the expense of completing the work shall be deducted from the contract price, but that it shall be deducted from any money belonging to the contractors which the owner may have in his hands at the time of the contractor's failure or refusal to finish the work. This, of course, assumes that the contractor is entitled to the money retained by the owner for work already done, money retained under the 25 per cent. clause ; but it does not assume the right of the con-

tractor to the balance of the contract price for work which he did not do and which the owner was compelled to have done by other persons. On the contrary, by implication it excludes any recognition of the contractor's right to that unearned balance. Nevertheless, it might be conceded that if there had remained in the hands of the defendant any money due the contractors for work already executed, and he had applied that money to the completion of the houses, the argument would have great force, that the contractors' money finished the work, and that therefore it should be held to have been finished in contemplation of law by them, and hence, that they would be entitled to the balance of the contract price. In the New York case it was provided in the contract that the owner should give certain notice to the contractor to go on with the work, and that upon the contractor's failure to do so, the owner might then go on and complete it himself, and, therefore, the court assumed that it was in the election of the owner either to pursue that course or to fall back upon his common law right, and the court held that he had elected to proceed under this stipulation in the contract, and, therefore, could not fall back upon his common law right. But in the present case that element is wanting. And as to the money mentioned in the stipulation, there was no money remaining in the owner's hands at the time the contractors refused to proceed with the work; therefore, as matter of fact, the money of the contractors did not go to the completion of the work, and the reason which existed in the other case, and which might exist under different circumstances in this case, for holding that the completion of the houses was the work of the contractors, wholly fails.

The owner in this case did not assume to proceed under this special provision of the contract. He had the right as we have said, either to do that, or to fall back upon his common law right and rescind the contract and proceed to finish the work for his own benefit. He did not notify the contractors that he meant to proceed under this stipulation; he had no money of theirs with which to indemnify himself for the

cost of completing the work ; he did not proceed under any sub-contracts made by the contractors ; but he entered into possession of the houses (which if he were proceeding under the contract he would have no right to do until the completion of the contract) ; he made new contracts in his own name with third parties and at his own cost and expense, and when he effected a saving it is perfectly obvious that he did not do it for the benefit of those contractors but for his own benefit, and therefore that he expected and intended to exercise his common law right for his own benefit and not for the benefit of the contractors, and this it is clear he had a perfect right to do.

Some question might be made as to whether the existence of the order in favor of the plaintiff would make any difference as to the defendant's power of electing to proceed under the contract or to fall back upon his common law rights ; but the case does not present the facts for raising that question, because it does not appear that the defendant ever had it in his power to have the work completed with the contractors' money. If he had had money belonging to the contractors in his hands, it is questionable whether that might not have made it obligatory on him to proceed under the contract, but, as he had no money of the contractors in his hands after he accepted this order, and no power of election, this question does not rise upon the facts presented.

As it now stands, it appears to us that the owner, upon default of the contractors, proceeded under his common law right to rescind the contract, and take possession of the property and complete the houses for his own use and benefit, and that the contractors had no further claim upon him whatever, so that when he effected a saving it was for his own advantage, and not for that of the contractors, and does not come in any way within the scope of this stipulation in the contract. Therefore there was an error in this instruction of the court below which entitles the defendant to a new trial.

But this does not end the case. It appears by the contract that the defendant had the right to reserve 25 per

cent. of such instalment to be held until thirty days after the completion of the houses; evidently to secure the performance of the contract. In that condition of things he accepts an order from the contractors in favor of a sub-contractor, agreeing to deduct the amount of the sub-contractor's claim out of payments which will be due to the contractors on the completion of the houses by them. Now, if he paid any money after that to the contractors which he might have retained, and which was payable only on completion of the contract by them, it would seem that he paid that in his own wrong, and that, upon proof of that fact, the sub-contractor might maintain an action against him to the extent of any money so paid away to the wrong of the sub-contractor. But the evidence set out in the bill of exceptions does not disclose what the facts are in that respect, and it remains for the plaintiff to bring out the necessary facts on a new trial of the cause.

The CHIEF JUSTICE dissented, saying :

The plaintiff had furnished material which had entered into the construction of these houses—material which the defendant was now enjoying the benefit of. That but for this material being in the houses at the time defendant undertook to complete them, defendant would have had to purchase similar material himself, consequently he was saved just that much in the necessary cost of completion. It was a saving effected by defendant availing himself of the material furnished by the plaintiff, and for which the defendant ought, therefore, to pay, at least to the extent of the money saved on the original contract.

THE DISTRICT OF COLUMBIA vs. LEWIS CLEPHANE.

LAW. No. 19,781.

§ Decided January 8, 1883.

§ The CHIEF JUSTICE and Justices COX and JAMES sitting.

The defendant contracted with the District to lay a wooden pavement and agreed, on being notified, to repair any part of it which at any time during three years from the completion of the work should become defective from improper material or construction, and, in case of failure so to do, he agreed that the same might be done at his cost by the District. The pavement proved a failure and the defendant having been notified to repair failed to do so. Whereupon, the District authorities tore up the pavement and put down an asphalt one and thereafter brought this action upon the contract to recover the cost. There was no evidence offered at the trial showing directly the cause of the failure of the pavement, nor was it shown that repairs were made necessary by reason of any defect arising from improper material or construction. It was argued, however, that as some of the blocks had been shown to be sound when the pavement was torn up, that was a fact from which the jury might infer that the failure of the others was from imperfect material or construction.

Held, 1st. That such an inference might perhaps be proper had it been shown that the blocks which remained sound were placed in like position and subjected to the same exposure and wear and tear as the blocks that failed, but not otherwise. 2d. That a contract to repair a pavement "if at any time during the period of three years any part of it should become defective from improper material or construction" is not an unconditional guarantee that the pavement shall last three years in any event. 3d. Nor will such an interpretation gather any force from the fact that in another portion of the contract there is a clause providing "that all loss or damage arising out of the nature of the work to be done under this agreement, or from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the same, or from any action of the elements, or from incumbrances to individuals, property, or otherwise, on the line of the work, or adjacent thereto, shall be sustained by the said contractor." Such a clause is well known in building contracts and relates only to losses or damages which may happen during the progress of the work. 4th. That the District could not substitute a new pavement of an entirely different character and recover the cost thereof from the defendant. 5th. That the contract being to repair "if any part of the pavement should become defective from improper material or construction," no liability arises on the part of the defendant unless the repairs are shown to have been necessary because of defects arising from "improper material or construction."

MOTION for new trial on exceptions.

THE CASE is stated in the opinion.

RIDDLE & MILLER for plaintiff.

COOK & COLE and W. F. MATTINGLY for defendant.

Mr. Justice JAMES delivered the opinion of the court.

The exceptions taken in this case, relate to the interpretation given by the court below, to the contract sued upon,

and to an instruction to the jury to find for the defendant. It is shown by the record that in October, 1872, the Board of Public Works made a contract with the defendant to lay down a wooden pavement on Twelfth street in this city. In the written contract there was a provision that :

“ If at any time during the period of three years from the completion of the work to be done under this contract any part or parts thereof shall become defective from imperfect or improper material or construction and in the opinion of the said party of the first part require repair, the said party of the second part will, on being notified thereof, immediately commence and complete the same to the satisfaction of the said party of the first part, and in case of failure or neglect of the said party so to do, the same shall be done under the directions and orders of the said party of the first part at the cost and expense of the said party of the second part.”

The declaration founds the action upon this clause of the contract. The proof was that within the three years specified, the pavement went pretty much to destruction ; whereupon the authorities of the District took up the whole of it—probably the whole of it—but certainly the whole of it but one square, and substituted an asphalt pavement which cost the District something over forty thousand dollars. Some of the blocks, what proportion we do not know by the proof, were rescued from the wreck and were made use of in repairing or patching one of the squares. In the absence of any evidence directly showing the cause of the failure of the other blocks, it was argued that the fact that some of the blocks remained sound while others failed, should have gone to the jury as evidence from which they had a right to infer that the failure of the latter was from “imperfect or improper material or construction.” It might, perhaps, have been very proper to have allowed the jury to draw such an inference, had it been shown where those blocks that continued good were situated—whether they were placed in the same or like position, and subjected to the same exposure and wear and tear, as the blocks that failed ; but without such evidence, we do not think that the jury would have had

a right to conclude that because some of the blocks remained sound and others failed, the failure was to be considered as proof that they were not originally as good as those which survived ; in other words, that they were of "imperfect or improper material or construction." It may have been that those which remained sound were not put upon the same basis or subjected to the same tests as those which failed. There was no evidence upon this point offered, and without it such an inference would have been unwarranted. Legal conclusions are not mere surmises ; the jury must have before it some basis of fact whereon to rest their conclusions before they will be allowed to make them.

It was claimed, however, that this clause in the contract amounted to a guarantee that the pavement should last three years. But that claim is in the very face of the language of the stipulation. It is there distinctly stated that "if at any time during the period of three years any part of the pavement shall become defective from imperfect or improper material or construction," such and such things shall be done. It was for that case alone that this clause provided, and we do not think that it can in any way be construed as a guarantee that the pavement should last three years in any event.

In further support of this argument, it was also urged that the sixth clause of the contract contributed to this meaning. That clause reads as follows :

"Sixth. It is further agreed that all loss or damage, arising out of the nature of the work to be done under this agreement, or from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the same, or, from the action of the elements, or from incumbrances to individuals, property, or otherwise, on the line of the work, or adjacent thereto, shall be sustained by the said contractor."

It is true enough that all parts of a contract are to be taken into consideration in construing it, but that very principle excludes the interpretation contended for. It is not to be supposed, that this clause, which has a special ap-

plication, is to be enlarged to a general clause relating to losses or damages. On the contrary it is evident, when all the language of this sixth clause is taken together, that it related to what might happen during the progress of the work. The losses spoken of are associated with damages which might be incurred during the prosecution of the work. It is a well-known clause in building contracts, that if the work should happen to be destroyed while in course of construction that the contractor is to restore it. As if, for example, in building a house, the walls are knocked down by any exterior force, they are to be built up again, or if the contractor, in the course of the erection of the building, injures any neighboring property, he is to assume all responsibility therefor. This, it seems to us, was the purpose of this sixth clause, and not that it was intended to enlarge the other clause into an unconditional guarantee that the work was to last three years.

We come now to another question of interpretation. Evidently, on the ground that this system of wood paving was a failure, the District substituted for it, as we have seen, an asphalt pavement, costing, it is claimed, over \$40,000, and it is now sought to recover from the defendant the cost of the work as damages under this clause of the contract. We do not see how it is possible for this to be done. This contract requires the defendant to repair his pavement, not to substitute for it an entirely different one. When called upon to repair his old pavement, if he did not do so, the District was authorized to do it for him at his cost. But this is quite another thing from substituting a new pavement of an altogether different character.

It has been argued that it is not to be supposed that the District would again put down the same kind of pavement which had been discovered to be a failure. That may be so, and was probably sound judgment; yet we do not see how it can be of any avail under the contract upon which this action is based. The contractor was to repair a certain kind of wooden pavement, and the District reserved the right in case of his failure to comply with this particular provision

of the contract, to do it for him at his expense. There was no reservation of any right to substitute in such case at the contractor's expense an asphalt or any other kind of pavement. They were simply authorized, under certain conditions, to repair the old one. Our interpretation of the language of this contract is in entire accord with that of the court below.

It is said, however, that as some of the wooden pavement was relaid by the District, it should have been allowed to recover for that ; but here again there was no proof whatever as to the costs incurred by reason of this relaying. It is true it was shown that something over \$1,200 was expended in taking up all of the wooden pavement, but what was the cost of relaying such of the blocks as were found useful for that purpose does not appear. Had the case gone to the jury, they would have been left entirely to conjecture as to that matter ; and even if the cost of relaying had been shown, there was still no proof that the expenditure was forced upon the District by reason of the imperfections of the contractor's work. It does not follow because it was necessary to expend money upon this street that it is to be charged to the defendant. The expenditure may have been entirely unnecessary, or it may have been caused by a failure in the pavement not traceable to any defect or imperfection in the work for which the contractor was responsible, and, therefore, not chargeable to him. The burden of showing this was upon the plaintiff. In the entire absence, therefore, of any proof from which the jury might have even inferred the facts necessary to support a verdict against the defendant, and have enabled them to say that the expense to which the District was put in the relaying of these blocks arose out of the defective material or construction of the work, we are of the opinion that the court below was right in instructing the jury to render a verdict for the defendant. The judgment is, therefore, affirmed.

THOMAS E. WAGGAMAN

vs.

EPHRAIM S. RANDALL ET AL.

EQUITY. No. 24068.

{ Decided January 10, 1882.

{ The CHIEF JUSTICE and Justices COX and JAMES sitting.

1. An appeal lies to the General Term from an order of the Circuit Court striking out a plea of title in a landlord and tenant case and remanding the same to the justice of the peace for trial on the merits.
2. When a defective plea of title is stricken out by the Circuit Court and the cause remanded to the justice of the peace the defendant may there file a new or amended plea of title.

STATEMENT OF THE CASE AND DECISION OF THE COURT.

This was a proceeding commenced before a justice of the peace to recover possession of certain premises in the city of Washington. The plaintiff averred in his complaint that the premises were detained without right by Charles G. Godfrey and Ephraim S. Randall, to whom plaintiff had leased the same under the firm name of Godfrey & Randall, and whose tenancy and estate therein had determined by the terms of the lease.

Godfrey did not appear and no step was taken in his behalf. Randall appeared and filed a plea of title, averring :

"That the title to said premises is in Mary F. Stone, and that the said title hereby claimed is not derived from any letting of the premises by the plaintiff, or by those under whom the plaintiff claims, and is not derived from any forcible entry or forcible detainer."

Plaintiff objected, that this plea was defective in its failure to aver that the defendant claimed the premises under Mary F. Stone.

The justice certified the case to the Circuit Court, where the plaintiff moved to strike out the plea of title and remand the cause to the justice for trial on the merits. This motion was sustained, and the cause thereafter coming on for trial before the justice, the defendant filed a perfected plea, averring that he claimed under said Mary F. Stone, in whom he pleaded title. The case being again certified to the Circuit

Court for trial on this plea, the plaintiff again moved to strike it out and to remand the cause to the justice for the following reasons :

1st. Because the former plea of title has been by the court adjudged a nullity, and it was the duty of the justice of the peace, when the cause was remanded to him, to have tried the same, and to have rendered judgment in the matter as the right of the case required.

2d. Because the said defendant Randall elected to stand upon his former plea of title, and cannot file a second plea or amend his former plea ; and because no amendment to a plea of title or additional plea can lawfully be made.

This motion being sustained, the defendant appealed to the General Term, where the judgment was reversed and the cause remanded to the Circuit Court for trial upon the plea of title as amended.

WM. F. MATTINGLY for plaintiff.

CHARLES S. MOORE and W. T. JOHNSON for defendant.

JOSHUA GREEN vs. JOHN L. LAKE AND JONATHAN TARBELL.

LAW. NO. 20,891.

{ Decided January 8, 1882.

{ The Chief Justice and Justices Cox and James sitting.

1. In the District of Columbia a printed seal at the end of the signature is sufficient to make the instrument a specialty.
2. Where parties sign an instrument under seal jointly or jointly and severally, they sign it as principal debtors, and parol evidence will not be received to show that one of them signed as surety only and that an extension having been given the principal, the surety was thereby discharged. But whether it would be otherwise if the alleged surety is prepared to show that he has been actually injured by the extension, *quære*.
3. A contract between a creditor and a principal debtor for forbearance for a limited time, is a discharge of the surety only when the agreement to forbear is binding on the creditor, if, therefore, the agreement is without consideration, or otherwise not binding, the forbearance is no defence.
4. The burden of proof is on the surety to show that an agreement to forbear is a valid and binding one upon the creditor.
5. If the creditor simply agrees to extend the time indefinitely on payment of the legal interest, that is no more than he would be entitled to receive without any agreement, and as he receives no new consideration, such a promise is not binding, but it is otherwise if, in consideration of the extension, the interest were paid in advance, for the creditor in such case gets something more than he would be entitled to receive as a matter of course.
6. An agreement to forbear in consideration of an executory promise to pay usurious interest in the future, is void under the statutes of usury, nor does it make any difference that at the expiration of the period of forbearance the usury was actually paid by the debtor.
7. Where the surety sets up the defence that the creditor had extended the time of the principal, the creditor is not estopped, by the fact that he has received the consideration for which the extension was made, to reply that the consideration was an illegal one.
8. The court will presume, in the absence of evidence to the contrary, that the usurious interest was agreed to be paid at the expiration of the period of forbearance.
9. The legal part of an undertaking can be enforced if the consideration for it is entirely legal, but an undertaking is void if any part of its consideration is illegal. Thus if a man receive a legal consideration for a promise to do a thing, part of which is legal and the other illegal, he will be compelled to carry out that part of his agreement which is legal; but if such a promise is not given for money or other value received, but in consideration of another executory promise, such as a promise to forbear, the latter is vitiated by reason of the partial illegality of the executory promise given as its consideration and the agreement to forbear is, therefore, not binding.

STATEMENT OF THE CASE.

MOTION for new trial on exceptions.

This was an action of debt brought by the surviving partner of J. & T. Green, against John L. Lake and Jonathan Tarbell, based on the following promissory note given by them :

“\$1,000.

JACKSON, MISS., Nov. 18, 1875.

“Sixty days after date, we, or either of us, promise to pay J. and T. Green, or order, one thousand dollars, value received.

“J. L. LAKE, JR. [SEAL.]

“J. TARBELL. [SEAL.]”

The words “seal” opposite the names of the defendants, and the brackets enclosing those words, were in print.

Besides two special counts on the note, the declaration contained the common counts appropriate to the action.

The defendant Tarbell pleaded the general issue, and the following special plea :

“And for a further plea to the said first and second counts of said declaration, the said defendant says that he received no consideration for the making and delivery of said note or writing obligatory in said declaration mentioned, and never received any benefit therefrom, but executed and delivered the same as the surety for the said John L. Lake, jr., and the consideration therefor, if any, passed wholly from said J. & T. Green to said Lake, of all of which the said J. & T. Green had notice at and before the execution and delivery of said note to them. And said defendant says that after the said note or writing obligatory became due and payable, according to its tenor and effect, by an arrangement and agreement made between the said J. & T. Green and the said John L. Lake, jr., without the knowledge or consent of this defendant, the said J. & T. Green, for a valuable consideration, extended the time for the payment of said note or writing obligatory for sixty days from the time it became due, according to the terms thereof, without the knowledge, concurrence or consent of said defendant. And so said defendant says that he is absolved from all liability on said note or writing obligatory, and the said plaintiff is barred of all recovery against him thereon, and this he is ready to verify, &c.”

Issue being joined, the plaintiff, on the trial, offered in evidence the note, the signatures of which were admitted. It was also shown that the statute of Mississippi in force at the time of the execution of the note, and at the time of the

trial, provided that a scroll should be equivalent to a seal, and that the Supreme Court of that State had twice decided that the word "seal" printed opposite a name was equivalent to a scroll. Plaintiff having rested his case, the defendant Tarbell was then sworn as a witness in his own behalf and testified that he signed the note at the request of Lake, on his representation that he desired to have it discounted—which was subsequently done by plaintiff—and that he signed as surety for Lake, and not as principal, and that he received no consideration for signing, and no part of the proceeds of the discount, nor any part of the consideration for which the note was given; that he never spoke with the firm of J. & T. Green, of which plaintiff was the surviving partner, or their cashier, about the note, at any time or place, either before or after the giving of the same; that he had no notice or knowledge from them, or from Lake, or from any other person, of any extension of time for the payment of the note, and never assented to any such extension.

The defendant Lake was then sworn, and testified that the note was executed by the defendant Tarbell as his surety; that the plaintiff knew this at the time, and that the same was discounted about the time of the date thereof at the banking-house of J. & T. Green; that the proceeds of the discount were passed to the credit of witness in said bank, he having there at that time a deposit account; that Tarbell received none of the proceeds of the discount, and that plaintiff knew this. Defendant Lake further testified that the payment of the note was extended for sixty days from its maturity, by virtue of an agreement between himself and the cashier, without the knowledge of Tarbell, and that the following endorsement was then made on the note by the cashier: "Extended to March 20, sixty days' interest due;" that the time of the payment of the note was, on another occasion, and without the knowledge of Tarbell, extended indefinitely; that the only consideration for the respective extensions of the note was interest at the rate of one per cent. per month, paid, or to be paid, by witness to plaintiff; that witness did not remember whether the interest was paid

at the time the extensions were granted, or after the periods of extensions had expired ; that this agreement and the endorsement for the extension of sixty days was made about the time the note became due ; that he made several payments of interest at different times, and paid in all about \$175 as such, up to July 1st, 1877.

The defendant, then, proved that the following was the law relating to interest and usury in force in the State of Mississippi at the time the note was given and the alleged extensions made :

“The legal rate of interest on all bonds, notes, accounts, judgments and contracts shall be six per cent. per annum ; but contracts may be made in writing for the payment of a rate of interest as great as ten per cent. per annum. And if a greater rate of interest than ten per cent. shall be stipulated for, in any case such excess shall be forfeited, on the plea of the party to be charged therewith.”

This was all the evidence offered on the part of Tarbell, who thereupon rested his case. During the giving of the above testimony, plaintiff's counsel, at the proper time, objected to all testimony tending to show that the defendant Tarbell had signed the note in the capacity of surety. But the court overruled the objection, exceptions being taken.

The plaintiff then testified in rebuttal, without objection, that “the time of the payment of the note was not voluntarily extended by J. & T. Green ; as it was not paid, it was continued against the wish of the holders, because neither party would pay.” It was never agreed to extend the note. When the parties claimed not to be able to pay it, they at one time paid interest, and Lake promised to pay at some future time, which is the full meaning of the memorandum “Extended.” Not that they did not constantly look to the parties and urge payment during the interim, but, in consequence of Lake's promise, filed the paper away at that date as the earliest date they could hope to collect in, and with the intention of especially urging the fulfilment of said promise. It was put off because they could not collect, and

for no other reason. He (Tarbell) did know that the note was not paid, and that he would be expected to make it good, and he knew of Lake's promise, and was anxious to have it carried out.

On cross-examination, plaintiff said : "The note sued upon was given for borrowed money, and the money was paid to J. L. Lake, the party who negotiated the note. The note was not extended in the sense of an agreement with any one, but only laid over because it could not be paid, and this was done with the knowledge of Tarbell ; it was generally so understood in the house, although personally I did not converse with Tarbell on the subject, as such course is left to our cashier, W. H. H. Green, usually."

And plaintiff then offered in evidence the deposition of the cashier, W. H. H. Green, which was admitted without objection, in substance as follows : It (the note sued on) was never extended, but was held, and time of payment delayed from first maturity till the present writing, against the will of the firm. Tarbell knew the note had not been paid, and asked for time for Lake to pay it. I spoke to Tarbell several times about the matter, and he seemed anxious that Lake should pay the note, &c.

The testimony on both sides being thereupon closed, plaintiff's counsel requested the court to instruct the jury that on the whole evidence the plaintiff was entitled to recover the amount claimed against the defendant Tarbell, but this the court refused to do ; to which refusal exception was duly taken.

The case being then given to the jury under the instructions of the court, a verdict was returned in favor of Tarbell and against the defendant Lake.

A motion for a new trial being overruled, the case came to the General Term on the exceptions taken at the trial.

HANNA & JOHNSTON for plaintiff:

Was the testimony relied on by Tarbell admissible or competent to show that he received no consideration for the making and delivery of the instrument, and that he was not bound as principal, but only as surety?

First, as to the alleged want of consideration.

The substance of Tarbell's testimony on this point is that Tarbell signed the note as accommodation maker in order that Lake might discount it; that Lake procured plaintiff to discount the note and himself received the entire proceeds.

Counsel for Tarbell stated, when he offered this evidence, that he expected to show that plaintiff knew that Tarbell executed the note as surety for Lake.

But these circumstances are everywhere held to show that a consideration was received by the accommodation maker. *McDonald vs. Magruder*, 8 Peters, 475, 476.

As the extension of credit to Lake constituted a consideration for Tarbell's execution of the note as matter of law, Tarbell's assertion that he received no consideration is a mere denial of the conclusion of law flowing from the facts stated by himself, and is therefore inadmissible.

Tarbell's statement that Lake received the entire proceeds of the note is immaterial, and tended to mislead the jury, and is, therefore, inadmissible.

Moreover, the instrument sued on is sealed. For this reason it cannot be shown by parol evidence that the maker received no consideration.

Second, was it proper to permit Tarbell to show by his parol testimony that he signed the instrument only as surety?

Tarbell's whole testimony is that he signed the note at the request of Lake, on the latter's representation that he desired to procure it to be discounted (which was subsequently done), and that he signed said note as surety for Lake and not as principal. Counsel for Tarbell stated, when this evidence was offered, that plaintiff knew when the note was executed that Tarbell executed it as surety for Lake.

There is no pretense by defendant that any fraud, accident or mistake contributed in any way to the execution of the note or its delivery to the plaintiff. The note took the direction intended by all parties.

Nor is any doubt suggested by the instrument whether the promise by Tarbell is direct or only collateral. On the contrary, the body of the note sets out an absolute and direct promise by more than one, and two persons sign in the same mode.

The proposition, therefore, is that Tarbell shall be allowed to flatly contradict, by his parol evidence merely, the positive language of his written promise, and to convert an absolute into a collateral obligation by setting up a concurrent and inconsistent parol agreement. Such evidence is clearly improper under the principles of law which prevail in the federal courts governing the introduction of parol evidence to vary written contracts.

The leading case on that subject is *Bank of U. S. vs. Dunn*, 6 Peters, 51, 57, 58, 59. And the rule laid down in that case has been reaffirmed in the following, among other, cases: *Bank of Metropolis vs. Jones*, 8 Peters, 12, 16, 17; *Sprigg vs. Bank*, 10 Peters, 266 (case of alleged suretyship); *Brown vs. Wiley*, 20 Howard, 442, 447, 448; *Specht vs. Howard*, 16 Wallace, 564.

In the last case the court excluded the parol evidence intended to vary the instrument, notwithstanding that it was claimed that the scrivener had made a mistake in the particular point then sought to be corrected by the parol proof. *Forsythe vs. Kimball*, 91 U. S. 291, 294; and *Martin vs. Cole*, 104 U. S., 30, which is a very recent and a very strong authority. See, also, *Daniel Neg. Inst.*, §§ 80, 81.

But, even if it were competent to show, in the way indicated, that Tarbell was a surety, the facts do not operate to relieve him from liability.

Because it is necessary that the agreement for an extension of the time of payment shall be founded on a valuable consideration, and be otherwise obligatory on both the creditor and the principal debtor. *Ross vs. Jones*, 22 Wall., 588; *Philpot vs. Briant*, 4 Bingham, 717; *Gahn vs. Mechiwitz*, 11 Wendell, 318.

But this agreement was not binding, because the only consideration moving to Green was the payment of interest;

and an agreement to extend an interest-bearing debt in consideration of the payment of interest is *nudum pactum*. *Halstead vs. Brown*, 17 Indiana, 202 ; *Agricultural Bank vs. Bishop*, 6 Gray, 319 ; *Chitty Contracts* (6th Eng. Ed.), 580 (note *c*) ; *Bank vs. Rollins*, 13 Maine, 202 ; *Bank vs. Willard*, 17 Pick., 150 ; *Gahn vs. Mechiwitz*, 8 Paige, 314 ; 11 Wendell, 312, 318, 319.

An extension of a debt in consideration of an usurious rate of interest is not obligatory, and, therefore, does not release the surety. The promise to pay such interest is voidable, at Lake's election, under the statute. There was, therefore, no mutuality, and the contract for extension never was binding. 2 Am. Ld. Case, 470 ; *Shaw vs. Brinkard*, 10 Ind., 227 ; *Payne vs. Powell*, 14 Texas, 600.

Even if Tarbell has any redress by reason of the facts set out by him, his remedy is in equity and not at law.

COOK & COLE for defendant Tarbell :

If the holder of a note signed by principal and surety, makes an agreement with the principal, after the note becomes due, to delay the payment for a specified time, in consideration that the principal promises to pay the interest for that period ; and this is done without the knowledge and assent of the surety ; the agreement to pay the interest for such period furnishes a sufficient consideration for the promise to delay, and the surety is discharged. *Bailey vs. Adam*, 10 N. H., 162.

Nor is the rule changed if the contract be to pay usurious interest. *Wheat vs. Kendall*, 6 N. H., 504.

The same has been held where a separate note was given for the interest in advance. *Walters vs. Swallow*, 6 Whart., 446.

Where the interest is paid in advance this is evidence in itself of an agreement for a delay for the time for which it is paid. The difference in the two classes of cases seems to be that where the interest is not paid in advance, there must be an express contract to delay for a definite time in consideration of the interest promised to be paid. But where

the interest is paid in advance, an agreement is inferred from this circumstance. *Sprigg vs. The Bank*, 20 Peters, 257; *King vs. Baldwin*, 2 Johns. Ch., 554; *McLemore vs. Powell*, 12 Wheaton, 554; *Crosby vs. Wyatt*, 10 N. H., 318; *Bank vs. Ela*, 11 N. H., 336; *Bank vs. Mallet*, 34 Me., 547; *Claggett vs. Salmon*, 5 G. & J., 314.

In a suit upon a promissory note against joint and several makers, it is competent for the defendant to show by parol evidence that he was only a surety, and that plaintiff, knowing that fact, so dealt with the principal as to discharge the defendant. *Grafton Bank vs. Kent*, 4 N. H., 221; *Pol-lard vs. Stanton*, 5 Ala., 455, approves 4 N. H.; *Bank vs. Mallet*, 34 Maine, 547; *Paine vs. Packard*, 13 Johns., 174.

The same rule applies where the instrument is under seal. Such evidence does not contradict or vary the deed, nor seek to show that there was no consideration, but only who had the benefit of the consideration, so as to show the relation between the parties. *Archer vs. Douglass*, 5 Denio, 509; *Bank vs. Carroll*, 5 Ham. (Ohio), 207; *Kendall vs. Grice*, 1 Mackey, 279; *Dearborn vs. Thrasher*, 7 Cowen, 48.

The time for the performance of a condition of a sealed as well as an unsealed instrument may be enlarged by parol. *Fleming vs. Gilbert*, 3 Johns., 528; *Keating vs. Price*, 1 Johns. Chan., 23; *Bangs vs. Mosher*, 23 Barb., 481; *U. S. vs. Howell*, 4 Wash. C. C., 620.

These questions do not conflict with *Spriggs vs. The Bank*, *supra*, as there, the bond recited that all were principals which worked an estoppel. And see also the following authorities: *Bank vs. Coumb*, 47 Mich., 358; *Smith vs. Sheldon*, 34 Mich., 42; *Borron vs. Cady*, 40 Mich., 259; *Wilson vs. Lloyd*, L. R., 16 Eq. Cas., 60; *Carpenter vs. King*, 9 Metcf. (Mass.), 511; *Smith vs. Rice*, 27 Mo., 505; *Paul vs. Berry*, 78 Ills., 158; *Higdon vs. Bailey*, 26 Ga., 426; *Matheson vs. Jones*, 30 Ga., 306; *Piper vs. Newcomb*, 25 Iowa, 221 (Dillon, Chief Justice); *Cummings vs. Little*, 45 Me., 183 (Facts exactly like this case to show defendant was surety.—Especially relied upon); *Bank vs. Smith*, 30 Vt., 148; *Kennedy vs. Evans*, 31 Ill., 258; *Flynn vs. Mudd*, 27

Ill., 323; *Murray vs. Graham*, 29 Iowa, 520; *Orvis vs. Newell*, 17 Conn., 97; *Neel vs. Harding*, 2 Met. (Ky.), 247; *Coats vs. Swindle*, 55 Mo., 31; *Bank vs. Wright*, 53 Mo., 153; *Bank vs. Burns*, 46 N. Y., 170; *Kelly v. Gillispie*, 12 Iowa, 57; *Riley vs. Gregg*, 16 Wis., 666.

In the two cases last above cited, agreement to pay usurious interest was the consideration for the time given, and it was held valid, and a discharge of the surety, on the ground that the contract was voidable only at the election of the person agreeing to pay it, and that the creditor could not be allowed to take advantage of his own wrong. Dixon, Chief Justice, delivered the opinion in the Wisconsin case, and in support of the position that the creditor could not take advantage of the agreement to pay usurious interest, cites *La Forge vs. Hester, &c.*, 5 Seld., 241; *Draper vs. Prescott*, 29 Barb., 401.

It will be seen from an examination of the above cases that Chief Justice Parker, of New Hampshire, Chief Justice Shaw, of Massachusetts, and Judges Cooley and Dillon, are committed to the admissibility of the defence in this case, as are many other able judges.

The instrument sued on is not a bond, but a simple contract. There is neither the word "seal" in the body of the instrument, nor a scroll opposite the name. One or the other has always been considered necessary in this jurisdiction to render a writing a sealed instrument. The word seal printed opposite the name is not a scroll.

The character of the instrument is to be determined by the general commercial law, and not by the rule of construction of the State where made. *Swift & Tyson*, 16 Peters, 18; *Oates vs. Nat. Bank*, 20 Otto, 246.

Mr. Justice Cox delivered the opinion of the court.

This is an action brought upon an instrument in the following language :

"\$1,000.

JACKSON, MISS., Nov. 18, 1875.

"Sixty days after date, we, or either of us, promise to pay to J. and T. Green, or order, one thousand dollars, value received.

"J. L. LAKE, JR. [SEAL.]

"J. TARBELL. [SEAL.]"

The question was suggested in the outset, whether this was to be treated as a sealed instrument or a simple contract. The action is brought in debt, which would apply to an instrument bearing either character. It is in evidence that by the law of Mississippi, where this contract was made, this is a sealed instrument, and we have no hesitation in saying that by the law of the District of Columbia it must also be so regarded. Written scrolls have been, from time immemorial, regarded as seals here. For twenty years we have been in the habit of using printed forms of conveyancing for real estate, with printed seals only, and to hold that these are not seals would be to upset many of the titles created during that time. So we must consider this as sufficiently a seal to make this instrument a specialty, if that be material to the issue involved.

The defence made in this case by Tarbell is, that no part of the consideration for this instrument was received by him, but that he signed it at the request and for the accommodation of the other maker, J. L. Lake, jr.; in other words, that he was simply surety for Lake, and that this fact was known to the payees; that at the maturity of the note, the payees, without his knowledge or consent, agreed with Lake, the principal, to extend the time for the payment of the note for sixty days, and thereby discharged him, Tarbell, who was simply a surety. The evidence offered at the trial tended to show that the consideration offered for this extension was an agreement to pay interest at the rate of one per cent. a month during the period of the extension. At the

trial, parol evidence of these facts was offered, and objected to by the plaintiff on the ground that it tended to contradict the written instrument. In this connection, it may be stated that the question of the admissibility of parol evidence in a case like this will present two aspects; first, as evidence tending to show that the contract of the debtor with the creditor was that of a surety and not of a principal; or, second, that although the contract of the debtor with the creditor was that of a principal, yet the relation between the two debtors themselves was that of principal and surety, one being an accommodation maker, and having a right to indemnity from the other if he should be called upon to pay the debt.

The grounds of objection to this evidence were, that on the face of this instrument it purports to be the obligation of two principal debtors, joint and several; that the creditors have a right to deal with each one of them as a principal debtor; that although the creditor may know their relations to each other, yet he may ignore them, inasmuch as they do not concern him, and that no defence can be made by either one of these parties, which is not available to a principal, but is only available to a surety; that to admit parol evidence tending to show a defence which could only be made by a surety, is to admit parol evidence to vary the contract from what it is expressed to be, or what is imported on the face of the written instrument. It is further argued that it will not do to say that this evidence is offered, not to contradict the written contract between the debtors and the creditor, but simply to show the relation between the two debtors, because that fact is offered to be proved for the very purpose of establishing a different contract relation between the debtors and the creditor from that which appears on the face of the instrument; that it is offering to do in an indirect way what cannot be done directly; that is, to let in a defence which could only be made if the debtor was contracting expressly as a surety and not as a principal.

In my own judgment, on strict common law principles, this objection was well taken. I think the better commenta-

tors recognize it as such, and that the older common law authorities tend to sustain the objection. The later authorities, however, take a different view. A court of equity deals with this matter in a manner different from the common law. A court of equity does not profess to change by parol evidence the written contract between the creditor and the debtor, but it says to the creditor: "Although you have two principal debtors and may sue either one of them as a principal, we will not allow you to ignore the relation that exists between those two debtors themselves, or to exercise your rights so as to prejudice one of them. If you know that one of them is simply an obligor or promisor for the accommodation of the other, and if, by surrendering securities in your hands to the principal debtor, you prejudice the surety as between themselves, we will not allow you to do it. And not only that, but the surety has a right to call upon us to require you to prosecute your claim against the real debtor, and we will enforce that right and will not allow you to put yourself in an attitude where you cannot enforce it, by contracting for time with the principal debtor; and if you do that, it shall involve the loss of recourse." This is upon somewhat the same principle upon which a court of equity will marshal securities where a mortgagee has an encumbrance covering two different pieces of property. In such a case, although he may resort to either, a court of equity will compel him to resort to one first, for the benefit of a junior encumbrancer who can only resort to the other. In course of time, these notions became transplanted from the courts of equity to the common law courts, and the latter came to hold that, what a court of equity would forbid to be done by a creditor, should be a ground of defence to the one of two debtors who occupied the relation of surety for the other, so that they would allow him to plead in bar the action of the creditor in giving time to the one who was, as between the debtors themselves, the principal. And in order to give effect to this defence, they have gone further and said that parol evidence may be introduced to show the relation between two or more debtors; and, in answer to the

objection that this was contradicting the face of the obligation, they have said : " We do not allow the evidence to be introduced for the purpose of contradicting the contract between the debtor and the creditor, but simply to show the relation between the debtors themselves, and that may be shown by parol evidence."

It seems to me that this is all wrong, as I have already explained ; for what is the use of admitting the evidence for that purpose, unless we go farther and hold that the relation between the debtors is shown for the express purpose of varying the relation between the debtors and the creditors from what it appears to be on the face of the instrument of indebtedness? Nevertheless, it must be admitted that in point of numbers the balance of authority in the State courts is in favor of the admission of this kind of evidence. They have not gone further, however, and held that the evidence may be admitted directly to contradict the obligation between the debtors and the creditor ; but, on the contrary, they have avoided that and expressly disclaimed it, and said that the evidence was admitted simply to control the relation between the debtors themselves.

On the latter question, whether parol evidence can be admitted to show that the contract between the debtors and the creditor differs from what it purports to be on the face of the instrument, the Supreme Court have spoken in one case—*Sprigg vs. The Bank of Mount Pleasant*, 10 Peters, 266. In that case there was an obligation signed by several parties, in which they all describe themselves *expressly as principals* under seal ; differing, in that respect, from the present agreement. There, several of the parties undertook to give in evidence that they were sureties only, and were so received and treated by the plaintiffs. Naturally, the question of estoppel presented itself there first. They had signed as principals, and the court held that they were estopped. In that case they offered to show that, although they had signed as principals, their obligation to the creditor was really that of sureties only, but the court said they were estopped by the sealed obligation. But the court went further, and said :

"But admitting that, although the defendant has upon the face of the obligation become bound as principal, yet, a court of equity might allow him to set up that he was only surety, and let him in to all the protections that are usually extended to sureties; the present case is to be governed by rules applicable to proceedings in courts of law; and upon this point, the rule seems to be well settled, that where principal and surety are bound jointly and severally to a bond, although there is no express admission on the face of the instrument that all are principals, yet, the surety cannot aver by pleading that he is surety only. In the case of *Rees vs. Berrington*, 2 Ves. Jun., 542, Lord Loughborough held, that when two are bound jointly and severally in a bond, they both appear as principals, and the surety cannot aver that he is bound as surety; but if he could establish that at law, the principle at law is that he has an interest in the condition; and if the time of payment is extended, that totally defeats the condition, and the consequence is that the surety is released from his engagement. This point is directly adjudged in the case of *The People vs. Jansen*, 7 Johns., 337. The question there turned entirely upon the pleadings, and the court let in the defence which discharged the surety, upon the sole ground that it appeared upon the face of the bond that the ancestor of the defendant was surety only; otherwise the defendant would have been estopped by the bond from alleging that he was surety only. But the fact appearing upon the face of the bond, the defence might be set up at law as well as in equity. The case of *Paine vs. Packard and Munson*, 13 Johns., 174, although the court admitted the surety to set up by plea at law matter in discharge of his liability, is very distinguishable from the present case. That was a suit upon a promissory note, and the court, upon demurrer, sustained a plea interposed by the surety, alleging a special request made to the plaintiff to prosecute the principal and averring a loss of the debt by reason of his neglect to prosecute. The plea in that case was sustained, on the ground that there was no conflict between the note and the averments in the plea. For, says the court, the aver-

ments and facts stated in plea are not repugnant or contradictory to the note. That the fact of Packard having been surety only, is fairly to be presumed to have been known to the plaintiff, and he was in law and equity bound to use due diligence against the principal, in order to exonerate the surety.

"The plea averred that Packard signed the note as surety, and the demurrer admitted the facts. Had it appeared upon the face of the note that Packard signed it as principal, there is no reason to conclude that the court would have let in the defence then set up.

"It could not, in such case, have been said that there was no repugnancy between the averments in the plea and the note, which was the ground upon which the plea was sustained. But this case has not, under any view of it, relaxed the rule with respect to bonds or sealed obligations, which are not open to an inquiry into the consideration."

It is, therefore, asserted by the Supreme Court, in this case, that where parties sign an instrument under seal, jointly or jointly and severally, they sign it as principal debtors, and will not be allowed even to aver in pleading that one of them signed as surety. This decision related to the question, between the debtor and the creditor, of the admissibility of proof to show that the relation between them was that of surety when it purported to be that of principal. The cases cited from the States, in the argument, all look to the other question of showing the relation between the two debtors themselves. The question naturally presents itself: in what shape was this evidence offered in the court below? I think, upon examination, that it goes farther than is warranted even by the decisions from the State courts.

The defendant does not confine himself in this case to the offer to prove that, as between him and Lake, he was simply an accommodation maker and that Lake was bound to pay the debt or indemnify him against loss; but he goes further and undertakes to prove that, as between him and the creditor, he was simply a surety. Tarbell, the defendant, was sworn

as a witness, and was asked by his counsel whether he had signed the note in the capacity of principal, or as surety for Lake. Now, it will be observed that this note is not the contract between these two debtors, but the contract between them, jointly and severally, and the creditor—their promise to pay the creditor so much money. Tarbell was asked whether he signed the note, that is, whether he entered into this contract with the creditor in the character of principal or as surety, and he testified that he signed it on the representation of Lake that he desired the note discounted, and that he signed as surety for Lake and not as principal; and the counsel proposed to follow that up with evidence that the plaintiff had knowledge at the time that the note was signed by Tarbell in the character of surety. Now, it seems to us that that is evidence to contradict the face of the instrument, and, therefore, coming within the decision of the Supreme Court, and running beyond the decisions in the State courts which have been cited in support of the plea, and that, therefore, it ought to have been excluded. I think the courts are unanimous in excluding the evidence as it was offered, while they are divided as to whether it can be admitted to show the relation between the debtors themselves. I think, therefore, individually, that there was error on this ground in admitting that parol evidence.

But supposing that evidence to have been properly admitted, and that it is not objectionable on the ground already mentioned, the next question is, how far is it competent on other grounds? The defence, as I have already stated, was, that an agreement was made with the principal debtor to extend the time for the payment of this debt without the knowledge or consent of the surety. The evidence is, that the time for the payment of the note was extended to sixty days from its maturity by virtue of an agreement between the plaintiff and Lake, without the knowledge of the defendant Tarbell, and that the only consideration for the respective extensions of said note, first for sixty days, and then indefinitely, was interest at the rate of one per cent. a month

paid or to be paid by Lake to the plaintiff, and that he, Lake, did not remember whether said interest was paid at the time said extensions were granted, or after the extensions had expired; that this agreement for sixty days was made about the time the note became due, that he paid the interest for the sixty days, but is unable to say whether he paid it at the time of the agreement or after the sixty days expired.

Now it is very important that we should know that fact, because, if the interest was paid in advance for the forbearance, the authorities mostly agree that that is a sufficient consideration for the extension, and inasmuch as the burden is upon the defendant to show a valid agreement between the plaintiff and the principal debtor for the extension, it is important for him to show that the consideration was paid in advance; and that is not shown by his saying that he either did that or something else, he does not remember which. On the face of this bill of exceptions, we must assume that there is no evidence of the payment in advance and must treat it as if there was simply an agreement to pay the interest at the end of the period of forbearance. The plaintiff alleges that this consideration was usurious, under the law of Mississippi, and that the agreement for the extension was, for that reason void. The law of Mississippi has been put in evidence here, and is found in the Revised Statutes of that State, the law of 1871. It is singularly vague and incomplete. It provides that "the legal rate of interest on all bonds, notes, accounts, judgments and contracts, shall be six per cent. per annum, but contracts may be made in writing for the payment of a rate of interest as great as ten per cent. per annum [so far the law agrees with ours], and if a greater rate of interest than ten per cent. shall be stipulated for, in any case such excess shall be forfeited, on the plea of the party to be charged therewith."

We understand this to mean that in the absence of any stipulation as to the rate of interest, it will be fixed at six per cent. and that even a verbal contract for interest at six per cent, is good, but that beyond that rate it is not good;

and that a written contract is good for the rate of ten per cent., but, that beyond that it is not good if the facts be pleaded. Whether, when the party stipulates verbally for more than six per per cent., he shall lose the whole or the excess, is a point on which this law is absolutely silent, and we are left to inference, but as to the excess, the agreement must be void. The general rule on this subject, undoubtedly is, that a contract between the creditor and the principal debtor, for forbearance for a limited time, shall be a defence to the surety, but it necessary to show a binding agreement which absolutely ties the hands of the creditor. If the promise is made without any consideration at all, it does not bind him, and it is no defence to the surety. For example, if the creditor simply agrees to extend the date indefinitely on payment of the legal interest, that is no more than he would be entitled to without any agreement ; he receives no new consideration, and such a promise is not binding. It has been held, however, that if the creditor and the principal debtor both agree that the extension shall be for a definite period, the creditor gets some advantage because he has his money secured as an investment for a stipulated time, whereas otherwise, the debtor is at liberty, at any moment, to pay and put the creditor to the trouble of re-investing his money. Again, it is agreed that if interest is paid in advance of the extension, the creditor gets something more than he would be entitled to as a matter of course, and that that sustains the agreement for forbearance. It is further held, by most of the cases (although some hold the other way), that even if *usurious* interest be paid *in advance*, that is a sufficient consideration to make the promise binding ; and it is further held in a late case, that if usurious interest be paid for *past* forbearance, and also in consideration of *future* forbearance, that will be sufficient consideration, and that the agreement may be availed of by the surety as a defence ; but the general current of authority is, that an agreement to forbear in consideration of an executory promise to pay usurious interest in the future for that forbearance is void under the statutes of usury. One

or two cases were cited in argument in which the court said that it did not lie in the mouth of the creditor to set up the illegality of his own agreement ; which is a singular proposition, because it amounts to this : that the creditor is not permitted to show that the agreement which he made is one which he could not enforce, and one which therefore must be void for want of mutuality. This is contrary to the whole current of decisions. I have had occasion to examine the cases cited, and I find that in every one of them the usurious interest was paid in advance, and that it was held that, the creditor having received the full consideration for his promise, it did not lie in his mouth to say that the agreement was void.

In some of the States the law makes the contract to pay usurious interest valid to the extent of the legal interest and void as to the excess ; and in two cases cited in argument the court applied that law to the agreement for the extension of the overdue debt. Now, unless the law in express terms required that application, it seems to me there was error, and the court failed to distinguish between the *original* agreement to pay usurious interest for the forbearance received and this *executory* contract for extension. The distinction is very plain and simple. If a man receives money which is a legal consideration, and for that consideration promises to do two things, one legal and the other illegal, as, for instance, to pay the principal debt with legal interest, which would be legal, and also to pay a bonus, which would be illegal, there is no reason why he should not be compelled to carry out that part of his agreement which is legal and for which he has received full consideration and more than a full consideration. But if the promise to do two things—one illegal—is not given for money or other value received, but in consideration of another executory promise, such as a promise to give further time, this latter cannot be enforced by reason of the partial illegality of the promise which was its consideration. In other words the legal part of an undertaking can be enforced if the consideration for it is entirely legal, but an undertaking is void if any part of its

consideration is illegal. It will be seen, therefore, that there is a wide difference between the original promise to pay a legal debt with legal and illegal interest and a subsequent promise to pay that debt, and also illegal interest, in consideration of a promise to forbear or extend. In the former case the promise is supposed to be founded upon a legal executed consideration. In the latter case the promise to pay is founded upon an executor's promise to forbear, and this latter promise is vitiated by the partial illegality of the executory promise given as its consideration, and the agreement to forbear is therefore not binding.

Back of this, however, lies still another question. Some of the old books take a distinction between a consideration which is partially illegal and one which is simply partially void. Certain parol promises under the statutes of frauds are void but not illegal. They are not against public policy and are not forbidden. The law simply requires certain evidence to support them and will not sustain actions upon them without it, but if they are properly supported in proof the law will enforce them. But the usury laws originally absolutely prohibited usurious contracts and inflicted penalties upon the receipt of usury and did not allow the party to recover at common law upon a usurious contract either legal interest or principal. It has been suggested that the modern usury laws in the United States do not go so far, but merely make the debt void but not illegal. Now the ground of prohibition in the usury laws is that the contract itself was against public policy, and such contracts are forbidden upon that ground. Our usury laws, although they do not inflict penalties for the receipt of usury, generally do, nevertheless, absolutely prohibit recovery upon contracts for the payment of interest beyond certain limits. This law that we have here under consideration does that. It does not allow a party to recover upon a parol contract beyond a certain rate, and even upon a written contract it does not allow any recovery at all beyond ten per cent. Why not? It must be upon the ground upon which the old statutes were based, that it would be oppressive, and that it is against

public policy to allow such recovery ; and, if so, my judgment is, that even these laws are to be considered as declaring such contracts as not only void but illegal.

But after all, the distinction is one without a great deal of difference. Supposing the consideration to be one partially void, and not partially illegal, there are intimations in some of the very old authorities (in cases found in Croke's Elizabeth—as far back as that), that if a consideration is partly void, and the void part is simply frivolous and worthless, the valid consideration will still sustain the contract ; but there is a series of cases holding that where the contract is an entire promise to do two things, and it is void as to one part, and that an essential part of the consideration, it is to be treated as an entire obligation, and the invalidity is a defence.

In the present case it will be observed that the promise in consideration of the forbearance, was not exactly a promise to do two distinct things, one legal and the other illegal, but an entire promise to pay interest at the rate of one per cent. a month. It was an entire promise, and the promise of forbearance was based upon the whole of this consideration. And if as to one entire half of that promise it is to be considered void—I mean the promise of the debtor—in my judgment the promise of forbearance was void also for want of mutuality. If the courts should say that the obligee was bound to give this forbearance, and yet could only recover one-half of the interest promised to be paid, they would change his contract entirely, because the promise to forbear was based entirely upon the promise to pay twelve per cent. per annum—one per cent. a month ; and the court is not at liberty to change that contract.

Nor does it make any difference that, at the expiration of the period of forbearance, the usury was actually paid by the debtor.

The whole question in the case is whether the obligee was at any time, bound under the contract for forbearance, not to bring suit on this instrument. If not, then that gives no defence to the surety. But, according to the views I have

expressed, there was no time from the maturity of this note to the institution of this suit, when the creditor was not at liberty to bring this suit or was under obligation to forbear. That was the state of facts during the period of the extension, and the subsequent payment of the usurious interest, could not change that state of facts. At most, it was a voluntary payment which he was not bound to make, for a voluntary indulgence which the creditor might have withheld.

In our judgment, therefore, the evidence which was offered did not tend to establish a valid and binding contract to forbear, according to the terms of this asserted agreement, and it was, therefore, even if proved, no defence to the alleged surety against the creditor. A new trial is therefore ordered.

Mr. Justice JAMES :

While concurring in the conclusion just announced, I have a very little to add to what has been said, and that is upon the question of admitting parol testimony to vary such a written contract as we have in this case.

It is well settled that where the contract shows on the face of it that a party has contracted only as surety, his contract cannot be altered by the creditor, and if the latter by a binding agreement extends the time of the principal debtor, the liability of the surety is at an end. But it is said, and some of the cases cited support the doctrine, that even when the surety has placed himself on the face of the contract in the position of principal, he may still show by parol proof that as a matter of fact his assumption was that of surety only, and that whenever this can be shown, any extension of time to the principal debtor has the same effect. But the cases are by no means harmonious upon this question. I, however, conceive the true principle will be found to be laid down in a case cited from Massachusetts.* In that case the party who appeared on the contract as a principal was allowed to show that as matter of fact he bore to the other debtor the relation of surety ; that the creditor had extended the time of the principal ; that the latter had become insol-

*Carpenter vs. King, 9 Metcf., 511.

vent, and that the surety had actually been damaged by the extension of time. That was a purely equitable defence, and I think it was the right view to take of the matter. In my opinion, when such a case comes before a court of law, the defendant ought not to be permitted to alter by parol testimony the terms of the written contract upon the face of which he appears as principal, unless he is prepared to show that the creditor's extension of time to the real principal has been an actual injury to him as surety. This is as far as a court of equity would go, and in my view it is as far as a court of law ought to go. The defendant in the case before us has shown that there was an extension of time, but we ought not to presume that this mere extension has been an injury to him. It does not appear, as a matter of proof, that the principal debtor was insolvent, or that the defendant, as his surety, was in any way injured. We may surmise that he was, and we have been told that he was, but the proof does not show it.

I am aware that there are cases, supported by very high authority, which hold a different doctrine, and declare the surety, in such cases as this which we have before us, discharged even where no injury to him is shown to have resulted from the extension of time, but just because the cases are not harmonious upon the subject, I feel myself free to follow those which, in my opinion, lay down the true doctrine; and that is, that the principle is carried far enough in a court of law when it is carried as far as a court of equity would carry it. In all the rest of the reasoning of my brother Cox I fully concur. I do not think this contract for extension was binding upon the plaintiff even if it be permitted to be shown.

Mr. Chief Justice CARTER, dissenting, said :

It will be perceived that there is no necessity for an apology for the existence of a difference of opinion on the bench in reference to this case, inasmuch as there is such a conflict of authority among the decisions upon the principal question raised by it.

In the first place, it seems to me, that there is an entire misconception of the subject to say that you are contradicting the contract simply because you go under and behind its written language in order to sift out the relations of the parties to it, and regulate their responsibility according to the equities of those relations. In my opinion there is no such thing as contradiction about it. If there was, there would be an end of the matter, for nothing is better settled than that a written contract cannot be contradicted by an oral one. The doctrine is founded upon the equitable theory that you may go below the surface and inquire into the relations *in fact* of the parties, not for the purpose of contradicting the contract, but for the purpose of seeing whether the contract has been satisfied. It is for the purpose of placing the parties where they contracted and leaving them in their correlative relation to the contract. And then when you have found out what the parties have done under and in pursuance of the contract which they have made, if any one of them has done anything in prejudice of the rights of the others that the law ought to take cognizance of, you are to adjust their rights accordingly. The courts in repeated instances have held that you may make at law an equitable defence, and show that a contract has been equitably satisfied by the action of any of the parties to it.

What is the case here? J. L. Lake and J. Tarbell, by their sealed obligation or note, agreed to pay J. & T. Green, or order, one thousand dollars, for value received; the paper being dated November 8, 1875. Upon that note or bond—for it is in its technical significance an instrument under seal—these parties appear as joint and several obligors, and as principals. That note was drawn payable sixty days after date, and went into maturity, and on the back of it is the writing of the bank, either through its president or its cashier, "Extended for sixty days." That is a definite extension, and if it is a valid contract and for a valid consideration, it would appear to protract this instrument and suspend the right of the interposition of legal process for the

term of sixty days. The case shows, if the proof is admissible, that to this undertaking Tarbell was not a party, and that he had no knowledge of it. It is further shown that Tarbell was an undertaker on this note, without consideration, operating to himself; that he merely came to the aid of Lake as a surety, and that that fact was known to the bank.

Here, then, you have, under the surface of this contract, the fact that Tarbell was really a surety, although in form a principal; that his character of surety was known to the payee of the note at the time of taking it and advancing the money and at the time of the postponement of the payment. Now, provided this is not obnoxious to objection on the ground of usury, had the bank any right to contract with Lake, who was known to them to be the principal debtor, for the extension of the paper for sixty days without the knowledge of Tarbell? In equity clearly not. It was argued that, admitting the suspension of the right of action and of the protraction of the contract for sixty days beyond the period limited by the surety, there is no evidence of damnification to Tarbell. I do not understand that it is necessary there should be. The extension of the time of payment and the change of the contract implied all that under the law, and if the superficial relation of these parties was that of principal and surety, there would be nothing to inquire about, and there would be an end of the case if this agreement for extension were otherwise valid and binding. I see no good reason why it should be otherwise when we have ascertained as a matter of fact the true relation of the parties.

The only question then is, was this contract for extension valid and binding. It is said it was an usurious agreement, and therefore void. I think this is the first time I have ever known Shylock to come into a court of justice and complain that he had been taking usury; and what is more, all the while with the usury in his pocket. He is the only man who complains of usury in this case, although it is generally from the other side that such a complaint comes. In my

opinion, however, the statute of Mississippi has been wrongly interpreted. That statute provides that the legal rate of interest on bonds, notes, accounts, judgments and contracts shall be six per cent. annum; and then it further provides that contracts may be in writing for the payment of interest as high as ten per cent., and if a greater rate of interest than ten per cent. shall be stipulated for in any case, such excess shall be forfeited *on the plea of the party to be charged therewith*—not on the plea of the party making the charge. It is left to the parties to contract for any amount of interest, but the statute says to the lender: "You shall not collect above a certain rate, if the borrower chooses to plead usury." The contract is voidable but not void, and it is voidable only upon the express plea of the borrower. The borrower here does not plead it. Shall the lender, who is trying to make such a defense, be successful, after contracting for this rate, and after taking advantage of it, under a statute which only provides that the plea shall be good when made by the other party? I do not understand the logic that can work out such a conclusion as that, and I do not agree with it. The defendant Lake, who paid the usury does not remember whether it was paid at the inception of the extension, or during its running, or at its conclusion; but I do not think it is material when the interest was paid, if it was paid and appropriated by the payee of the note. I quite agree with the court below in the ruling made in this case.

CHARLES COLEMAN vs. CHRISTIAN HEURICH.

LAW. No. 19,882.

{ Decided February 12, 1883.

{ The CHIEF JUSTICE and Justices HAGNER and COX sitting.

1. In an action for malicious prosecution, evidence that the defendant, in suing out the warrant, acted under the advice of a magistrate, police officer or other layman, is not admissible.
2. Nor will the declarations of the defendant, *post litem motam*, be admissible in his defence.
3. The plaintiff, for the purpose of showing the want of probable cause may show that, prior to his arrest, he was a man of good character and reputation in the community in which he resided, and that the defendant knew this.
4. Where it appears in the bills of exceptions that, notwithstanding an exception taken to the admission of certain testimony given by one of the defendant's witnesses, the same testimony was afterwards given by the defendant himself, without objection on the part of the plaintiff, the ruling of the court in admitting the testimony in the first instance, will be no ground for a new trial.
5. In an action for malicious prosecution, the defendant may testify as to his motive, and that he was not actuated by any malice or ill will in instituting or carrying on the prosecution.
6. Where a party selects from the evidence bearing upon the question of probable cause, an isolated circumstance, and requests the court to express to the jury an opinion as to its probative force, separated from any other fact proved in the case, a refusal to do so is not error.
7. Nor is it error to refuse to instruct the jury that in consequence of the defendant's failure "to assail the character and reputation," of the plaintiff, the presumption of the latter's good character and reputation, "become absolute in the case."
8. Nor to refuse certain prayers presenting propositions of law already set forth in other prayers, and subsequently enforced by the charge of the court.
9. The practice of multiplying instructions unnecessarily and of announcing to the jury abstract propositions of law in the words of the definitions from text books, whereby the jury are misled and embarrassed, commented on and condemned.
10. While it is the province of the jury to find whether the facts alleged in support of the presence or absence of probable cause, and the inferences to be drawn therefrom really exist, it is for the court to determine whether upon the fact so found, there be probable cause or the want of it.
11. Casual words in the midst of a long charge, where it is apparent that they could not have been understood by the jury as nullifying all the foregoing instructions in the prayers and charge, will not be a ground for new trial.
12. In an action for malicious prosecution, a verdict for the defendant will not be set aside, although the justice trying the cause has erroneously charged the jury if it appear from the record, that (conceding the evidence to be true) the plaintiff has failed to make out a case of want of probable cause.
13. Facts reviewed, which the court considers repel the charge of want of probable cause.

MOTION for new trial on exceptions.

THE CASE is stated in the opinion.

COOK & COLE for plaintiff.

W. F. MATTINGLY for defendant.

Mr. Justice HAGNER delivered the opinion of the court.

This is an action for malicious prosecution and imprisonment. The declaration states, with the usual averments of evil motive, that the defendant sued out a warrant against the plaintiff on the 9th of February, 1878, upon the charge of having stolen a lot of copper pipe, and caused him to be arrested and imprisoned; that the charge was false and groundless, and that the prosecution was dismissed and wholly ended before this suit was brought, and the plaintiff claimed \$10,000 damages.

On the same day a similar declaration was filed in case No. 19,883, which was brought by William Neil, the brother of Coleman, against the same defendant.

The general issue was pleaded in both cases and by agreement they were tried together before a jury, which rendered a verdict for \$50 in Neil's case, and returned a verdict for the defendant in the case at bar.

Neil's case is not before us; but the case of Coleman is here upon a number of exceptions to various rulings of the judge at the trial below. Several of these relate to the rejection and admission of evidence; others to the rejections of prayers offered by the plaintiff; and exception is also taken to certain designated portions of the judge's charge to the jury.

First, third and sixth exceptions.

The points presented by the first, third and sixth exceptions are so nearly the same, that they can be more conveniently considered together.

It appears from the *first* exception, that after the justice of the peace, Taylor, had testified on behalf of the plaintiffs that he had issued the warrant upon the application of the defendant, and had produced the several paper and docket

entries relating to the case, he was asked on cross-examination by defendant's counsel: "Did you not tell him (the defendant) at the time, that it was proper for him to swear out this warrant?" To this question the plaintiff's counsel objected "because the same was not proper testimony upon the issue joined, and because it does not relate to anything that was brought out on the examination-in-chief." The objection was overruled, and the witness answered "I did."

The *third* exception shows that officer Sturgis, a member of the police force, testified in behalf of the plaintiff, to the circumstances connected with the arrest; and upon cross-examination he was asked "if he did not advise Heurich that he was justified under the circumstances in swearing out a warrant for the arrest of the said plaintiff." To this question the plaintiff's counsel objected, upon the grounds urged to the similar question propounded to the justice on cross-examination; and the objection having been overruled, the witness answered that he told Heurich "that the information they had received would justify him in getting a warrant."

In the further progress of the case, the defendant was examined as a witness in his own behalf, and stated that after certain communications with the officers, he went to the justice of the peace, Taylor, "and told him all the circumstances, and he told him he was justified in suing out the warrant;" and to this conversation between the defendant and the justice, the plaintiff objected, and the objection was overruled and the testimony admitted; and this alleged error is the subject of the *sixth* exception.

The evident design of the counsel in these offers was to support the contention that the defendant was not liable for the prosecution since he had acted under the advice of the magistrate and policeman in suing out the warrant.

In our opinion the evidence was not admissible. Although a party may defend himself in this form of action by proof that before he took steps to procure the arrest he consulted with counsel learned in the law, and laid before him a full and fair statement of the facts, as they were then known to

him, and sued out the warrant under his advice, yet the authorities show no case where a similar exoneration has been allowed because the party acted under the advice of a magistrate, officer or other layman. *Stewart vs. Young*, 36 Md., 256. This was very clearly stated afterwards in the eighth instruction granted by the court at the request of the plaintiff, and also in the charge to the jury on page 36 of the printed record.

The questions set out in the *first* and *third* exceptions were liable to the additional objection that the matters therein referred to were not so connected with the subject brought out on the examination-in-chief as to authorize the defendant to make them the subject of cross-examination. If the inquiry had been a proper one, it could only have been pursued by the defendant by making the witness his own, and recalling him at the appropriate stage of the trial.

Second exception. The error alleged in this exception was the admission, upon cross-examination of officer Sturgis, of the defendant's declaration at the Police Court as to his indisposition to prosecute the plaintiffs because they were married men, and further that the defendant applied to the district attorney to *not pros.* the case.

The latter part of this statement was substantially given afterwards by the defendant in his examination-in-chief, and went to the jury without objection; and therefore the plaintiff cannot be supposed to have been injured by its admission on the cross-examination of Sturgis. Still we think the entire offer inadmissible, since Heurich could not properly offer such declarations *post litem motam* in his own exculpation.

The admission of such evidence would be in conflict with the cardinal maxim of the law, which prohibits a party's acts or declarations to be given in evidence in his own behalf. *Crawford's adm'r vs Beall*, 21 Md., 233.

Fourth exception. We are also of the opinion that the plaintiff was entitled, in the manner claimed in the fourth exception, "to prove that prior to his arrest he was a man of good character and reputation in the community in which

he resided, and that the defendant knew this, as tending to prove the want of probable cause." The offer was couched in the very words of the decision in the case of *Blizzard vs. Hays*, 46 Indiana, 166, cited in note 3 to section 454 of 2d Greenl. on Ev., and seems to be supported by the opinion of the court in *Barron vs. Mason*, 31 Vermont, 180, and also by a case in 23 Ills.

The statement in the text of 2d Greenleaf, section 458, relied upon by defendant's counsel as controverting this position, plainly refers to the right of the defendant to offer evidence of the bad character of the plaintiff in the first instance. The judge's instruction that "these men stand in the position of innocence *in regard to the offence with which they are charged*," and "that there is no inference to be drawn against their character *on account of that criminal accusation made against them, and subsequently withdrawn*," seems to be too restricted a statement of their right to be presented before the jury as men of good character, *in general*, as well as with respect to this accusation; and we think they were certainly entitled to show that this important fact in their favor was known to the defendant when he sued out the warrant.

Fifth exception. The fact stated by the witness Steeps, on cross-examination, that the defendant's wife furnished the "collateral," the deposit of which procured the release of the plaintiffs from imprisonment, was testified to afterwards by the defendant himself, as appears from the statement in the seventh exception, with circumstances of greater detail, altogether without objection on the part of the plaintiff, and hence the ruling of the court on this exception, if incorrect, could not properly be examined here.

Seventh exception. The plaintiff insists that the court erred in permitting the defendant to testify, on his examination-in-chief, "that he was not actuated by any malice or ill-will in instituting or carrying on the prosecution."

In our opinion the court's ruling on this offer was correct.

The objection urged by the plaintiff's counsel, that the allowance of such evidence would sanction the admission of

testimony, which in its nature it would be impossible to contradict, would equally exclude the denial of evil intent by a prisoner when examined in a criminal case. But the competency of such evidence in this class of cases cannot be doubted; although its admission by the court, by no means insures its adoption by the jury as true. It is well settled that a party who becomes a witness, becomes so for all purposes unless the statute limits his capacity, and may testify to his own mental processes, such as knowledge and intent, as well as to other facts. *Wheldon vs. Wilson*, 44 Maine, 1; *Lawton vs. Chase*, 108 Mass., 241.

In *Flickinger vs. Wagner*, 46 Md., 600, which was an action for malicious prosecutions, the defendant was asked by his counsel: "What was your motive in making the charge of perjury against the plaintiff?" And answered "that his motive was justice to himself and to society." The court of appeal held that the question and answer were admissible, and said: "The motive which operated upon and induced the defendant to have the plaintiff arrested on the charge of perjury, was directly involved in the issues before the jury, and being a competent witness under the evidence act, the defendant had the right to explain to the jury the motive under which he acted."

The eighth exception involves the propriety of the refusal by the court to grant five of the thirteen prayers offered by the plaintiff, the remaining eight having been granted.

The fifth prayer asked the court to say, "if the jury believe from the evidence that the facts and circumstances within the knowledge of the defendant were sufficient to induce a reasonably prudent man to believe that the coat referred to in the testimony was the coat of the plaintiff, Coleman, that does not in itself constitute a reasonable ground of suspicion strong enough to warrant a cautious man in instituting a criminal prosecution."

In this prayer the plaintiff undertook to select from the mass of evidence in the cause an isolated circumstance, and required the court to express to the jury an opinion as to its probative force, separated from every other fact proved in

the case. In the language of the court of appeals, in the case of *Johns vs. Marsh*, 52 Md., 337, "if a prayer of this character could be entertained in respect to one fact or circumstance, it could be with respect to any other in the case, down to the remotest and the most minute; and if in respect to circumstances in support of any particular fact, it would be proper so to instruct in respect to all opposing or adverse facts or circumstances. This would lead to manifest abuse." See also *Newham vs. McComas*, 43 Md., 78.

Nothing could be more plainly calculated to mislead a jury than to grant such instructions. Their effect would be to deprive each individual fact of the just support it should receive from its correlation with co-existing facts, by presenting them separately, and seeking the aid of the court to belittle the importance of each particular circumstance *seriatim*.

In *Stansbury vs. Fogle*, 37 Md., 387, the court, speaking of such a prayer, says: "But when a court has to deal with such a case after the evidence is all in, it would be highly improper to allow a part of the testimony, disconnected from all the other conceded facts and circumstances in the case, to be selected as the hypothesis, and upon that alone to declare there was probable cause for the prosecution, and thus defeat the action. Such a course would in many instances defeat the ends of justice."

Inadmissible as such a practice would be if repeated prayers presented successively *all* the facts in turn, it appears still more objectionable where a few only of the number are thus brought into a prominence calculated to dwarf those not thus presented, and which by this method the jury is almost invited to ignore.

The court was right in refusing to give an instruction based upon so partial and imperfect a presentation of the facts bearing upon the question of probable cause. Of the same character was the ninth prayer of the plaintiffs which required the court to say that if the jury should find that the police officers arrested the plaintiff before the defendant sued out the warrant, this did not constitute any reasonable

or probable cause or justification whatever for the prosecution.

In our opinion this instruction also was properly refused.

The *seventh prayer* is predicated of the supposed right of the defendant "to assail the character and reputation" of the plaintiff, and asks the court to instruct the jury that in consequence of the defendant's failure to do so, the presumption of the plaintiff's good character and reputation "became absolute in the case." But we are not prepared to admit that a defendant, as of course, has the right in an action for malicious prosecution, "to assail the character and reputation of the plaintiff," except in reply to affirmative evidence on the point already offered by the plaintiff. On the contrary it is expressly laid down in 1 Greenl. Ev., § 55, that evidence of the plaintiff's bad character is not received in trespass on the case for malicious prosecution. And the same author in sec. 458, vol. 2, states the matter thus: "Ordinarily, the character of the plaintiff is not in issue in this action. But in one case, where the charge was larceny, the defendant was allowed, in addition to the circumstances of suspicion, which were sufficient to justify his taking the plaintiff into custody, to prove that he was a man of *notoriously* bad character."

The position assumed in the prayer goes much beyond the decision in the exceptional case quoted by the author, and would amount to an assertion that the general character and reputation of a plaintiff may always be attacked in such an action, without reference to the nature of the charge, whether it be of theft or murder, or unchastity or forgery, and in the absence of evidence of good character already offered by the plaintiff. This would be too greatly at variance with the general principles on the subject of evidence of character to receive our sanction.

As the prayer contained this error, it was properly rejected.

The *tenth* and *thirteenth* prayers present definitions of malice, abstract in form, and quite unnecessary, if correct, in view of the ample declarations on the subject already set

forth in the plaintiff's fourth, eleventh and twelfth prayers, which were subsequently enforced by the charge of the court. It would be error in the trial court to multiply instructions unnecessarily, and thus mislead and embarrass the jury rather than assist them; and the practice of announcing abstract propositions of law, in the words of the definitions from text books, or of adjudged cases, which may be multiplied indefinitely, is a most objectionable form of this error, universally condemned by the appellate courts. Further, the tenth prayer would have worked an injustice if it had been granted, since it states that "malice, in law, means an act done wrongfully and without reasonable or *probable cause*," whereas it is plain that a prosecution may have been instituted maliciously, notwithstanding the existence of probable cause.

The *thirteenth* proposition, that "malice may be inferred from undue activity and zeal displayed," is as abstract a proposition as would be a definition of virtue or vice. It assumes that there was proof of such zeal and activity on the part of *some one*, not named; and leaves to the jury the determination of what might or might not justly be considered an "*undue*" amount of these qualities. The court might equally have been asked to say that an *absence of malice* might be inferred from great "zeal and activity displayed," for such would be as fair an inference if the zeal and activity had been displayed in *releasing* the prisoner.

The prayers were properly rejected.

The Judge's Charge.—The next error complained of is the statement of the judge to the jury in his charge in these words: "Now I am going to leave the question of *probable cause* and of malice entirely open for the decision of the jury upon the circumstances of the case." The plaintiff contends that it was the duty of the judge, of his own motion, in the absence of special request to do so, to point out the facts testified to, bearing upon the question of probable cause, and to instruct the jury that those facts, if found by them, did or did not constitute probable cause.

The authorities relied on in support of this contention

place the reason for the rule upon the anomalous nature of the inquiry, which in form is a negative averment made in the declaration and requiring some proof to be adduced in its support by the plaintiff; and also upon the intrinsic perplexity and difficulty of the question, which for that reason may always more properly be dealt with by the court. On the other hand it is insisted that there should be nothing special in the treatment of this class of cases by the court; and that, particularly where there is a decided conflict in the testimony, the whole inquiry should be left to the jury for their determination. The question seems to be by no means free from difficulty, on the words of the authorities, though that difficulty appears to have arisen largely from the want of exactness in the expressions employed in stating the rule.

Thus in 2 Greenl., § 454, the author, after stating that the facts material to this question are first to be found by the jury, and the judge is then to decide, as a point of law, whether the facts so found establish probable cause or not, says: "But if the matter of fact and matter of law, of which the probable cause consists, are intimately blended together, the judge will be warranted *in leaving the question to the jury.*" This last sentence would appear at first to justify the ruling of the judge below in the case at bar, but, in my opinion such is not the meaning intended to be conveyed by the author.

We understand the law, in actions for malicious prosecutions, to be well settled, that where the defence of probable cause involves undisputed facts; as where the defendant in his plea justifies his action as having been taken in performance of duty, as by an officer under command, or by a sheriff executing the mandate of a competent court, and it is not disputed that the proof establishes the truth of the facts so pleaded—the judge, *without leaving the examination of the facts to the jury*, should, as a matter of course, declare his opinion whether the facts referred to constitute probable cause in law, or do not.

Such action of the judge would be in accordance with the

universal practice of the courts where numbers of questions compounded of law and facts are presented in the course of a trial, which must be wholly decided by the judge : as, for instance, the proper construction or proper execution of writings ; the competency of witnesses ; whether a confession offered in evidence should be excluded because of previous threats or promises ; whether there has been sufficient proof of loss of an original paper, and of search for it, to justify the introduction of secondary evidence of its contents ; whether a communication is to be protected as confidential ; &c., &c. In each of these cases there may be serious questions of disputed fact to be determined upon examination of witnesses, but such evidence, however extended and conflicting, is solely for the courts, and is never submitted to the jury ; and the decision of the judge is based upon the credibility of the facts as well as the law.

But the inquiry arose whether the same rule should prevail where the facts were numerous and the evidence greatly conflicting, and closely blended with the principles of law governing the question of probable cause ; and the language is intended as a negative reply to this inquiry, and a declaration cited from Greenleaf assumes that in *such* cases the court would depart from this strict practice, and would leave to the jury to decide upon the facts ; advising them that as they should find the facts one way or the other, so the legal question of the existence of probable cause would stand. But we find no warrant in reason or authority for the position that the judge is authorised to submit the whole matter to the jury to determine for themselves the questions of law as well as of fact.

And when it is remembered that the defendant in this form of action is held to be fully justified if it appears he made the arrest upon the advice of counsel learned in the law that there existed probable cause for his action, while the amplest proof that he acted upon the advice of laymen, however intelligent, is held to be entirely immaterial, it would seem to be a strange inconsistency to leave the determination of the same question, at the trial to a jury of lay-

men, instead of again leaving its decision to one learned in the law—the judge on the bench.

Again ; if there is any point that may be raised in such a trial, that each party might reasonably wish to submit to an appellate court, it would be the question whether the act complained of, was one of wrong and oppression, or was one of duty justified by the surrounding facts. And yet, if the jury is authorised to decide this complicated and difficult inquiry, its decision upon the legal questions involved would be final and beyond re-examination.

The correct position, as I conceive it to be, is sustained by the best considered authorities. Thus, in 1 Taylor on Evidence, § 26, the author, who has been discussing the duty of the judge to instruct the jury upon certain subjects, proceeds as follows :

“ *First.* It is now clearly established—albeit the wisdom of the rule has recently been stoutly disputed—that the question of *probable cause* must be decided exclusively by the judge, and that the jury can only be permitted to find whether the facts alleged in support of the presence or absence of probability and the inferences to be drawn therefrom, really exist. For instance, in an action for malicious prosecution, the jury, provided the evidence on the subject be conflicting, may be asked whether or not the defendant, at the time when he prosecuted, *knew* of the existence of those circumstances which tend to show probable cause, or *believed* that they amounted to the offence which he charged ; and if they negative either of these facts, the judge will decide, as a point of law, that the defendant had no probable cause for instituting the prosecution ; and this rule—which is based on the assumption that judges are far more competent than juries to determine the question how far it may have been proper for a person to have instituted a prosecution—is equally binding, however numerous and complicated the facts and inferences may be.”

In a note to this section, the author quotes the decision of Tindal, Ch. J., in the case of *Panton vs. Williams*, 2 Q. B., 192, as follows : “ Upon the bill of exceptions we take the

broad question between the parties to be this, whether in a case in which the question of reasonable or probable cause depends, not upon a few simple facts, but upon facts which are numerous and complicated, and upon inferences to be drawn therefrom, it is the duty of the judge to inform the jury, that if they find the facts proved and the inferences to be warranted by such facts, the same do or do not amount to reasonable or probable cause; so as thereby to leave the question of fact to the jury, and the abstract question of law to the judge, and we are all of opinion that it is the duty of the judge so to do."

This doctrine, so firmly established in England, is equally well settled here in jurisdictions entitled to our entire respect. In Maryland it has never been the practice to charge the jury in civil cases, except in response to specific prayers for instructions. But this established practice is departed from by the courts there in actions for malicious prosecution. A reference to some of the later decisions of the appellate court of that State will fully sustain this assertion.

Thus, in the case of *Boyd vs. Cross*, 35 Maryland, 197, the court says: "The want of probable cause is a mixed question of law and fact. As to the existence of the facts relied on to constitute the want of probable cause, that is a question for the jury; but what will amount to the want of probable cause in any case is a question of law for the court. The jury in our practice are always instructed hypothetically as to what constitutes probable cause, or the want of it, leaving to them to find the facts embraced in the hypothesis."

This language is quoted "*totidem verbis*" in *Cooper vs. Utterbach*, 37 Md., 317, and in the same volume, at page 386, in the case of *Stansbury vs. Fogle*, the court says: "It is now the established doctrine, both in this country and in England, that what facts and circumstances amount to probable cause is a question of law, but whether these facts and circumstances exist in the particular case is for the jury. In this State the jury are instructed hypothetically, as to what constitutes probable cause, leaving it to them to find the facts embraced in the hypothesis."

In *Medcalfe vs. The Brooklyn Ins. Co.*, 45 Md., 205, the court quotes the same sentence, and says: "This course was not adopted in the present case. The appellant prayed the court to instruct the jury that the question whether the defendant had probable cause for instituting the criminal proceedings against him, was one to be decided by the jury upon all the evidence in the case. * * * The appellant's prayer submitted to the jury a question of law, and was therefore improper."

And in the recent case of *Johns vs. March*, 52 Md., 333, the court says: "Now, while it is perfectly well settled that if there be reasonable or probable cause to the knowledge and honest belief of the defendant, no malice, however flagrant or distinctly proved, will make the defendant liable, yet the question as to what does or does not amount to probable cause is not one to be submitted to the findings and conclusions of a jury. That question is one compounded of law and facts; and while the jury are required to find whether the facts alleged in support of the presence or absence of probable cause, and the inferences to be drawn therefrom, really exist, it is for the court to determine whether upon the facts so found, there be probable cause or the want of it. In view of this well-established principle, the prayer was properly rejected, even if it had been free from all other objection."

Such a course would be especially proper in this jurisdiction, where the judges always charge the jury irrespective of the instructions asked.

For these reasons we think there was error in this part of the judge's charge.

It is further objected that the judge erred in his ruling, in these words: "But in this case it appears that the arrest was made and the officers who made the arrest have been examined as witnesses, and I have concluded to instruct you not to be bound by the advice which they gave the defendant in this action; but at the same time you may consider it as a circumstance going to show probable cause for the prosecution, that they had examined the facts of the case. It, I

think, may be properly submitted to the intelligence of the jury, in coming to a conclusion whether the defendant had probable cause for the institution of that criminal proceeding." The judge had in the eighth instruction granted on the plaintiff's application, told the jury in the most explicit terms that the advice of the officers was not evidence tending to show the existence of probable cause, nor does it in any manner justify the prosecution by the defendant, and the jury should give it no weight or consideration in their deliberations." And in the sentence in the charge immediately preceding that complained of, he had repeated that the advice of the officers "is no justification whatever."

It is scarcely conceivable that the learned judge intended in the very next sentence to unsay what he had thus twice so positively stated, and we do not think the words are fairly susceptible of this construction. He evidently meant to tell the jury that the fact of the antecedent arrest by the officers (persons employed to trace out crimes and arrest those appearing to be guilty) was a circumstance to be considered under the head of probable cause; and in this statement he was undoubtedly correct, and if the court had stated to the jury how far the facts, to be found by them supported this defence, it would certainly have called attention to the fact that the defendant's oath had been made after the plaintiff had been taken in custody by the policemen. But if the counsel for the plaintiff feared that the jury might have been misled by the alleged inconsistency of the language with the previous utterances of the court, they should have called the judge's attention to the point after the delivery of the charge, when the difficulty could readily have been removed.

The exception to that part of the judge's charge, in which he used the expression that "good faith requires that he should make some examination," &c., discloses no error. It is very apparent that this casual expression in the midst of a long charge, could not have been understood by the jury as annulling all the foregoing instructions in the prayers and charges, inculcating the necessity of great caution on the

part of the prosecutor before suing out the warrant. See particularly the sixth prayer of the plaintiff granted by the court.

It remains to inquire whether the errors we have found in the record are of such a character as to require us to send the case back for a new trial.

The evidence as to the advice given by the justice and officer, which forms the subject of the first, third and sixth exceptions, was afterwards withdrawn from the jury by the most explicit instructions, and could not possibly be considered as having been before the jury when it retired for consultation. Its admission is, therefore, no ground for reversal.

We have stated that the judge below erred in leaving to the jury the determination of the question of probable cause and that it was his duty to have decided that matter himself, and announced his opinion upon the sufficiency of the evidence to establish the existence or non-existence of this all-important feature in the case.

If he had thus announced his opinion he would inevitably have told the jury that the facts did not sustain the averment of the declaration that the complaint was made and the arrest and imprisonment effected by the defendant, "without any reasonable or probable cause." The judge did not give such an instruction, but it is well settled that the appellate court may examine the record and ascertain for itself whether the case (conceding the testimony bearing on the subject to be true) is sufficient in law to sustain this indispensable averment, and if it finds, applying the words of the court in 45 Md., 206, that the appellant's evidence failed in its first and most essential feature—the absence of probable cause for the prosecution—to declare that it was legally impossible the suit could be sustained.

In our opinion there was such a failure in the case at bar.

It appears from the uncontested evidence that, on the 8th of February, 1878, Heurich, the defendant, was the proprietor of a brewery in this city, and that Neil and the plaintiff,

two colored men, who were half-brothers, were employed as workmen there ; that on the night of that day a lot of copper pipe was stolen from the premises ; that on the morning of the next day an officer came to Heurich and asked him whether he had missed any copper pipe ; that he said he had missed some, and the officer stated they had some at the station house, and on accompanying the officer to that place he was shown the pipe and bag in which it was contained, and recognized both as his property. That he was there told that the bag and its contents had been found near his brewery the night before, and that near by was found a brown coat, which his nephew and others recognized as the coat of Coleman, the plaintiff. That in the pockets of the coat were found a piece of dog's chain, which Heurich recognized as belonging to him, and a piece of candle of the description used in the brewery ; that there was some felt on one of the sleeves, and the coat smelt of beer ; that he was told Coleman had worn that coat to the depot in company with one of the employees when they went there to fetch some felt to the brewery, and had assisted in unloading the felt ; that the copper pipe had been stored in a cooper's shop on the premises which was kept locked at night, but was open by day, and that Coleman and Neil had assisted in putting the pipe in the cooper's shop ; that there was a fierce dog within the brewery enclosure ; that Heurich found the officers had already arrested the plaintiff and Neil on suspicion of having committed the larceny, and had them confined at the station house ; that he saw Coleman and Neil and thought their looks were suspicious. And that he thereupon made the affidavit and sued out the warrant, which was served on the plaintiff and Neil, who were held until the next day, when they were released upon bail furnished by Heurich's wife on his direction.

We are all of the opinion that these facts, shown to have been presented to Heurich at the time he made the affidavit, were sufficiently strong and clear to repel the charge that he instituted the prosecution "without any reasonable or probable cause." The defendant's act is to be estimated with

respect to the state of affairs then presented to him, and it seems impossible to contend that these circumstances were not sufficient to have constituted a reasonable ground of suspicion in the mind of a cautious man, that the accused was actually guilty of the specific offense charged against him. As is said by Justice Washington (in the case of *Munns vs. Dupont*, 3 Wash. C. C. R.), public officers in conducting prosecutions must proceed "in most instances upon the information of individuals; and if these actions are too much encouraged, if the informer acts upon his own responsibility and is bound to make good his charges at all events, under the penalty of responding in damages to the accused, few will be found bold enough, at so great a risk, to endeavor to promote the public good."

Every escape of evil-doers from prosecution is a fresh incentive to further misdeeds. In the words of the court in *Boyd vs. Cross*, 35 Md., 200, in a similar though less suspicious case, "investigation was certainly proper, and the placing the plaintiff in the hands of the officers of the law was the only course by which full investigation was likely to be had."

The ruling of the judge below, however, in thus leaving the question of probable cause to the jury, was altogether favorable to the plaintiff, since it placed it in the power of the jury to decide that the facts showed an absence of probable cause, while if the court had assumed the decision of the question, it certainly must have decided that those facts plainly showed its existence. The ruling, therefore, could have worked no injury to the plaintiff, and constitutes no ground for reversal.

This view of the case is in accordance with the decision of the court in *Nicholson vs. State*, reported in 38 Md., 154. In the trial of three parties for murder, the State offered in evidence the confession of Nicholson, one of the prisoners, made to a detective. The prisoner's counsel objected to its admission on the ground that it had been obtained by promise of immunity, and the detective, and the prisoner's brother, Thomas, who was present at the confession, testi-

fied before the court on the subject. The examination was protracted and the evidence extremely contradictory, and the court, recognizing the difficulty of a satisfactory decision, admitted the confession, and instructed the jury that they should give credence to it, or reject it, accordingly as they believed the statement of the detective, or that of the prisoner's brother.

The court of appeals decided that this was error, as the entire inquiry, including the question of the credibility of the witnesses, should have been determined by the court, and could not be delegated to the jury ; but it refused to reverse the judgment, and said the point was no longer material in the case, "as we are all of the opinion that the confession was admissible, and proper evidence, the ruling of the circuit court on that question must be affirmed. The only effect of the instruction given to the jury was to afford the prisoner's counsel an opportunity of arguing before them that the testimony of Thomas Nicholson was entitled to their belief, and consequently that the confession of the prisoner ought to be discarded from their consideration. The appellant was therefore not injured by the course pursued by the court in this respect, and cannot be entitled to a reversal for that cause." See *Walbrun vs. Babbitt*, 16 Wall., 577 ; *Greenleaf vs. Birth*, 5 Peters, 132.

The errors presented by the second and fourth bills of exceptions also become unimportant in this view of the case.

If the court had ruled out the evidence of Sturgis' conversation with Heurich at the Police Court, as stated in the second exception, instead of admitting it, our decision would remain unchanged.

That interview took place on the Monday following the arrest on Saturday, and could only have been applied by way of reflecting Heurich's antecedent motive when the arrest was made, which would relate to the question of *malice*, and not of probable cause.

So, if the court had admitted the evidence of the plaintiff's good character, as set forth in the fourth exception, the proper decision of the inquiry as to probable cause, in

our opinion, should have been as we have already indicated.

The question properly for Heurich's decision before he sued out the warrant, was whether there existed, to his apprehension, after due examination, reasonable ground of suspicion, founded upon the facts and circumstances, to justify him as a cautious man in handing over the suspected person to the public authorities. And it seems clear to us that a man of ordinary mind and caution, upon the presentation of such an array of facts, would have been fully justified in suing out the warrant, notwithstanding he was aware that up to that time the previous character and reputation of the accused had been good. Precious as is a good name, it cannot be endowed with such supreme potency as to place its fortunate possessor beyond inquiry in the presence of circumstances of strong suspicion supported by a connected train of facts, vouched for by men of equally fair repute. If such were to be the rule, the crowd of defaulting treasurers and bank officers of previously unquestioned reputation would enjoy still greater facilities for escaping with their plunder.

The same common sense that should compel a prosecutor to give due weight to the good character of the accused, would also instruct him that a good reputation is often undeserved. Lord Holt's familiar apothegm is but the echo of common human experience: "A man is not born a knave; there must be a time to make him so; nor is he presently discovered, after he becomes one."

Upon the whole case we cannot bring ourselves to question that the plaintiff received substantial justice at the trial. Upon the same evidence, taking out the application to him of the proof of the ownership of the coat, Neil recovered a small verdict. That additional circumstance proved against Coleman may well have turned the scale against him; and we are not surprised that such was the result.

The importance of the various questions so well presented by the counsel has led us into the fullest examination, which has satisfied us that the judgment below should stand.

WALLACH vs. CHESLEY ET AL.

LAW. No. 16,505.

{ Decided February 12, 1883.

{ The CHIEF JUSTICE and Justices HAGNER and COX sitting.

1. The landlord has no right to an attachment against his tenant's chattels which have been removed from the premises before the rent is due. His remedy is by judgment against the tenant and execution to be levied upon such chattels or any of them in whosoever hands they may be found.
2. Circumstances under which an attachment for rent may be issued by the landlord against the goods and chattels of the tenant.

STATEMENT OF THE CASE.

The plaintiff commenced an action before a justice of the peace to recover the rent of premises owned by her. The action was commenced by filing the following declaration :

" DISTRICT OF COLUMBIA,

" *County Washington, to wit:*

In Justice's Court, before A. C. Richards, one of the justices of the peace in and for the county and District aforesaid, this 10th day of February, 1882, in the case of—

SUSAN L. WALLACH, *Plaintiff,*

vs.

ANNIE R. CHESLEY, MARY C. CHESLEY,
AND CATHERINE HARRIS, *Defendant.*

} Law. No. 3075.

The plaintiff sues the defendants for that the plaintiff let to the defendants a certain house and premises, No. 332 Indiana avenue, northwest, in the city of Washington, D. C., to hold from the 15th day of October, 1881, for the term of one year, at \$80 per month, payable monthly, of which rent \$80 will become due on the 15th day of February, 1882, to wit, the rent due on the 15th day of February, 1882, and the defendants have quit the premises and left them vacant and unoccupied, and have removed all their personal property from the same, so that there is not sufficient property therein to satisfy said rent when the same shall become due and payable; and the plaintiff claims \$80.00, as will more fully appear by reference to the particulars of demand hereunto annexed.

SUSAN L. WALLACH.

The defendants to plead hereto on the 16th day of February, A. D. 1882, at 1 o'clock p. m.; otherwise judgment.

Particulars of Demand.

ANNIE R. CHESLEY, MARY C. CHESLEY,
and CATHERINE HARRIS,

To SUSAN L. WALLACH, Dr.

Feb. 15, 1882 :

To one months' rent, due on the 15th of Feb., 1882, for premises 332 Indiana avenue, \$80.00."

On the same day the plaintiff procured the justice to issue an attachment against the goods and chattels of the tenants. The affidavit, which is set out in full in the opinion of the court, was dated February 10th, and alleged that the rent would become due on the 15th of that month; that the plaintiff had a tacit lien upon the chattels of the defendants, and that the defendants had removed the said chattels off the premises. On the trial the justice rendered a judgment for the rent, and condemned the chattels to satisfy the judgment. Whereupon the defendants appealed to the circuit court, and there moved to quash the proceedings before the justice, on the ground of want of jurisdiction and for other reasons appearing on the record, which motion the court certified to the General Term to be heard in the first instance.

R. B. LEWIS and THOS. J. MILLER for plaintiff:

1st. Congress, in conferring jurisdiction on justices of the peace in cases of debt or damages arising out of contracts, &c., intended, by Section 997 Revised Statutes, to limit their jurisdiction to cases where the amount claimed does not exceed \$100. It does not necessarily imply that the *debt* must be *past due*. When other courts could take jurisdiction of a claim for debts not due (as for rent to become due at time of suit brought preceded by attachment), justices of the peace could likewise entertain jurisdiction. The language of the act does not necessarily impute that the amount claimed must be past due.

2d. Justices of the peace, before the passage of the landlord and tenant act, sec. 677, *et seq.*, Revised Statutes

had power to issue distress warrants. That act does not provide that the landlord's lien by attachment shall be enforced in any particular court. By fair construction it must have been intended by Congress to confer the jurisdiction to issue attachments on all the courts that had before that time jurisdiction to entertain actions for rent.

The act of Congress passed for the organization and government of the District of Columbia, see Revised Statutes, sections 61 and 62, especially conferred the power upon the legislature of the District of Columbia to confer additional jurisdiction upon the judicial courts of the District of Columbia, and also to define the jurisdiction of justices of the peace and prescribe their duties; accordingly the legislature did pass an act empowering justices of the peace to issue attachments, see that act, section 6, part 2, paragraphs 37 and 38, Laws of the Legislative Assembly.

3d. Attachments by virtue of section 678, Revised Statutes, can issue for rent not due.

4th. The words "*on the premises*," in section 679, define the particular personal chattels to which the landlord's lien attaches. It lasts for three months after rent is due, even though the chattels have been removed off the premises, and we contend that it was manifestly the intention of the legislature in the passage of this act to provide (and that the language of the act necessarily so implies) that when rent is not due and the tenant has removed his chattels subject to the lien, off the premises, an attachment for the same may issue on affidavit "*that the defendant is about to sell all or some part of said chattels*."

The affidavit "*that the defendant is about to remove said chattels*" applies to cases when the goods are yet on the premises.

The disjunctive *or* gives this remedy in either case; *i. e.*, if the tenant is about to remove the chattels off the premises, and, no matter where the goods may be, if he is about to *sell* them.

Otherwise, in case of an absconding tenant, one who would take up his goods in the night time and leave the premises,

the landlord practically loses the benefit of the lien conferred by the act. The tenant, pending any suit against him could easily dispose of the chattels to a purchaser without notice of the lien.

E. A. NEWMAN for defendant :

The motion to quash, certified to this court to be heard in the first instance, raises the following questions :

1st. Whether a justice of the peace has jurisdiction to issue an attachment for rent ?

2d. Whether a justice of the peace has authority to issue a writ in any action where the debt or demand is not due or claimed to be due?

3d. Whether, after goods have been removed from the premises, the landlord can enforce his lien by attachment ?

4th. Whether the affidavit filed by plaintiff is sufficient under the statute to justify the issuance of the writ of attachment ?

The power of a justice of the peace to issue the writ must be obtained, if at all, from sections 678, 679, 997 and 1018 of the Revised Statutes D. C., and it is apparent from a fair construction thereof that no such authority is conferred thereby.

Writs of attachment were unknown to the common law ; and being a summary process, and an extraordinary remedy provided by special statute, the power to issue the same must be expressly authorized and not left to inference or conjecture. No such authority has been conferred upon justices of the peace in this District.

The courts of justices of the peace are not courts of record, and they must therefore confine themselves strictly to the authority conferred upon them by statute. *Cox vs. Bros-hong, Burns (Wis.)*, 150.

An attempt was made by the late legislative assembly to give justices of the peace jurisdiction in all cases of attachment and replevin where the amount in controversy did not exceed the sum of \$100 (see sec. 6, part II, pp. 37 and 38, Laws of the Legislative Assembly); but this court held, in

the case of *Riggs vs. Kernwein*, No. 13,722, at law, that under that statute justices of the peace had no jurisdiction in replevin. By parity of reasoning they have no power to issue writs of attachment.

This court has held in several cases that the said legislative assembly had no authority to legislate upon general subjects, but merely in reference to matters of a police and municipal character.

In the case of *Oppenheimer vs. Lawrence*, No. 16,371, on the law side of this court, decided in 1877, it was held at *nisi prius* that justices of the peace had no power to take cognizance of writs of garnishment.

Justices of the peace have power to issue execution only. Rev. Stats. D. C., sec. 1018.

A justice of the peace cannot exercise jurisdiction in any case where the amount sued for is not due or claimed to be due; and in attachment proceedings for rent, the plaintiff, under certain circumstances, can institute suit before the debt is due. It is, therefore, manifest from the law that they are wholly destitute of the power claimed. Rev. Stats., secs. 997 and 679.

After the goods have been removed from the premises, the method of enforcing the landlord's lien is not by attachment, but by one of the other two modes prescribed by the statute. *Fowler vs. Rapley*, 15 Wall., 328; *Webb vs. Sharp*, 13 Wall., 14.

The affidavit in support of the writ is not in accordance with the statute, and for that reason, if for none other, the writ should be quashed.

Mr. Justice Cox delivered the opinion of the court.

This was an action commenced before a justice of the peace to recover the sum of eighty dollars for rent due to the plaintiff, and an attachment was issued by the justice of the peace against the goods and chattels of the tenants upon the following affidavit:

DISTRICT OF COLUMBIA,
Washington County. } *To wit :*

In Justice's Court before A. C. Richards, one of the justices of the peace in and for the county and District aforesaid, in the case of—

SUSAN L. WALLACH, <i>Plaintiff,</i>	} Law. No. 3075.
<i>vs.</i>	
ANNIE R. CHESLEY, MARY C. CHESLEY, AND CATHERINE HARRIS, <i>Defendants.</i>	

Personally appeared, Susan L. Wallach, the plaintiff in the above entitled cause, and makes oath that she is the plaintiff, and that the defendants, Annie R. Chesley, Mary C. Chesley, and Catherine Harris, are tenants under a lease as set forth in the declaration, and that the moneys she claims therein to become payable to her by the defendants, is for the rent of the said premises, which will become due on the 15th day of February, 1882, exclusive of all set-offs and just ground of defence, and to secure which the plaintiff has a tacit lien upon the personal chattels of the defendants, and that the defendants have removed all said personal chattels off the premises, and are about to sell some part of the same.

SUSAN L. WALLACH. [SEAL.]

Subscribed and sworn to before me this 10th day of February, A. D. 1882.

A. C. RICHARDS, J. P.

On that affidavit the usual warrant was given, and an attachment was issued against the goods and chattels of the tenants, and it was levied on those goods and chattels off the premises. The justice gave a judgment in favor of the plaintiff for eighty dollars and costs, and also a judgment of condemnation of the chattels seized by the constable. An appeal was taken from the justice's judgment, to the circuit court, and a motion was made there "to set aside the judgment of the justice of the peace and quash all the proceedings before the said justice of the peace for want of jurisdiction on the part of said justice of the peace, and for

other good and sufficient reasons appearing in the record." That motion was certified here in the first instance.

It is contended, on the part of the defence, that if a justice of the peace can issue attachments under any circumstances, he had no authority to do so under the circumstances set forth in these proceedings. It will be observed that the affidavit here shows, first, that the rent was not due at the time the affidavit was made and the attachment issued ; and in the next place, the affidavit further shows that the chattels had been already removed from the premises. Now, it is contended that the justice had no jurisdiction to issue an attachment under those circumstances, and we are referred to the act of Congress on that subject. That act provides, in the first section, for the abolition of the common law right of the landlord to distrain for rent. That right, as we know, was the right to seize the goods of either the tenant or a stranger, *upon the very land itself*. It was a right incident to a reversion. It related to the land. It involved no power of seizing the tenant's chattels anywhere but on the land.

There was a statutory extension of this right in favor of landlords, to the effect that, if the goods had been clandestinely removed by the tenant, they might be pursued within a period of thirty days by the landlord. But with that exception, the power of distress was confined to the chattels of the tenant on the land. That right is abolished by the first section of the act of Congress in question. As a substitute for this right so abolished, it is provided that the landlord shall have a tacit lien on such of the tenant's chattels on the premises as are subject to execution for debt, to commence with the tenancy and continue for a limited period. It then goes on to provide how this lien shall be enforced. It does not give the landlord a lien without any means of enforcement. It provides for several conditions of things ; first, when the rent is due ; and, next, when the rent is not yet matured. When the rent is due, the lien may be enforced by an attachment issued upon an affidavit that the rent is due and unpaid. There is no trouble about that. But it will occur to anybody, that the tenant may,

just before the maturity of his rent, and in order to avoid compulsory payment of it, remove his chattels or change the property in them. To meet that contingency, it is further provided that, even before the rent is due, if the landlord will make affidavit that the tenant is about to remove or sell all or some part of his chattels, the attachment may issue. And those are the only two cases provided for in the statute, in which an attachment is the remedy intended.

It is provided further, as we all know, that a lien may also be enforced by the landlord by obtaining a judgment against the tenant and issuing an execution which can be levied on the goods in whosoever hands they may be found ; and the landlord is also authorized to sue the purchaser and get judgment against him to the extent of the rent in arrears.

Now, the language that the defendant is "about to remove," clearly applies to a case where the goods have not yet been removed, and is inapplicable to a case where the goods have been removed from the premises. It is contended for the tenant here that the words "or sell," are limited to the same condition of things, and, we think, correctly. So that the statute should be interpreted as if it read, "that the landlord shall have a tacit lien on the tenant's chattels on the premises, and when his debt is not yet due, it may be enforced by attachment on affidavit that the defendant is about to remove or sell all or some part of the chattels on the said premises." But after they have been removed from the premises, the remedy is that provided in the second clause of section 679, that is, by judgment against the tenant, and execution to be levied upon such chattels, or any of them, in whosoever hands they may be found. And there seems to be sufficient reason for the distinction. As we have already stated, the common law right of distraining was confined to the chattels upon the premises. It was an exceptional right, and a very oppressive one in many cases ; and the remedy by attachment, given by this statute as a substitute for that, is itself an extraordinary and exceptional right, varying from the course of the

common law, and there is reason enough for holding that that remedy, which is a judicial seizure, as the other was a private seizure, of the debtor's property, before any judgment, should be confined to the condition of things in which the relation of landlord to the tenant, and of both to the property subject to the right, was unchanged. But if the property has been once removed from the premises and may have gotten into other hands, there ought to be a judicial determination of the cause of action before this extreme remedy can be resorted to, of a seizure before any hearing upon the merits of the claim.

We think, therefore, that after the particular chattels have been removed from the premises, the landlord whose debt is not yet due, has no right to an attachment for recovery, but must resort to a judgment and execution, and, therefore, the justice was without jurisdiction in issuing the attachment in this case. The motion, therefore, will be sustained. It is unnecessary to decide other questions which suggest themselves as to the power of a justice to issue attachments in any case, which is not necessarily involved in this case.

The motion is granted

SAMUEL STRONG vs. ALBERT GRANT.

LAW. No. 21,377.

{ Decided February 13, 1888.

{ The CHIEF JUSTICE and Justices HAGNER and COX sitting.

1. Where a decree in equity is relied upon as *res judicata* and is pleaded in bar in a subsequent suit, it must be shown that the decree was made upon the same subject-matter and for the same purpose, and that the parties in the character in which they are litigants, are identical.
2. For the purpose of ascertaining the point in controversy in a former suit and what the court really intended to settle by its decree, not only the record, but, if necessary, the *opinion*, as reported in the officially published report of the case, will be examined.
3. The matter settled by a decree in a former suit, stated by the court and distinguished from that of the case at bar and held not to be an adjudication of the present controversy.

STATEMENT OF THE CASE.

In the year 1869, the plaintiff, Strong, did certain brick-work on sixteen houses which the defendant, Grant, was then building. The price of the work was agreed upon, and in payment therefor, Strong was to take one of the houses at a fixed price. The contract was reduced to writing, and a conveyance of the house agreed upon was made by Grant, the deed being placed in the hands of Mr. Totten, as an escrow, to be delivered to Strong when the work was completed. Subsequently a new agreement was entered into by which Grant was to give Strong his negotiable note, payable within three months from the date of the completion of the work, when the old agreement was to be cancelled and declared null and void, and the escrow to be delivered up to Grant, otherwise said agreement to remain in full force and effect. Subsequently, in pursuance of this last agreement, Grant gave his note for \$1,547, and a paper was signed by which the escrow in Totten's hands was declared null and void. This last paper was signed January 1st, 1870, and on the same day Strong filed a mechanic's lien upon the houses, and brought suit in equity to enforce the same. The validity of the lien was disputed by Grant, and the cause coming on for final hearing, on appeal to the General Term, a decree was made holding the lien a valid one, and rendering judgment against Grant for \$1,547, with costs of suit. On an

appeal to the Supreme Court of the United States, this decree was reversed, (see *Grant vs. Strong*, 18 Wall., 623), on the ground that the agreement entered into by Strong showed that he had relied upon a security for the payment of his work inconsistent with the idea of a mechanic's lien, and that no such lien had ever attached. The cause was remanded to this court with directions to dismiss the bill, which was done.

Some five years elapsed, and Strong brought this suit upon the note, setting up a new promise within two years prior thereto.

The defendant, Grant, pleaded, besides the Statute of Limitations, two pleas, as follows :

2. That said plaintiff impleaded the defendant in a suit in equity for the same identical claim and cause of action in the declaration mentioned, in the Supreme Court of the District of Columbia, in equity cause numbered 1956, which cause was appealed to the Supreme Court of the United States, and such proceedings were thereupon had that said bill in equity was dismissed, and the promissory note therein and herein sued on, was delivered to this defendant, and was then and thereby discharged.

3. That said plaintiff impleaded said defendant in a suit in equity for the same identical claim and cause of action in the declaration herein mentioned, in the Supreme Court of the District of Columbia, in equity cause numbered 1956, which cause was appealed to the Supreme Court of the United States, and such proceedings were thereupon had, that said cause was decided in favor of this defendant and said bill in equity was determined.

To these pleas, issue was joined.

After the introduction of evidence, including the record of the equity cause, and the proceedings in the Supreme Court of the United States on appeal, and the decree thereunder, the defendant, Grant, prayed the court to give the following instructions to the jury :

1. If the jury find from the evidence that the plaintiff impleaded the defendant in a suit in equity for the same

cause of action as in the declaration herein mentioned, and the said suit in equity was tried, and appealed to the Supreme Court of the United States, and that such proceedings were thereupon had, that said bill in equity was dismissed by a decree absolute in its terms, not made on some grounds which do not go to the merits of the cause, such dismissal is a final determination of the controversy, and constitutes a bar to the suit.

2. When words of qualification, such as "without prejudice," or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on the merits, and is a final determination of the controversy.

The court having refused to grant these prayers and a verdict being rendered for the plaintiff, the case came to this court on exceptions to the refusal of the court so to instruct the jury. The other facts necessary to an understanding of the case appear in the opinion of the court.

ENOCH TOTTEN and FRANK T. BROWNING for plaintiff.

THE DEFENDANT appeared in his own behalf.

Mr. Justice HAGNER delivered the opinion of the court.

The only question before us upon the exception, is whether the judge below was right in deciding that the decree of the Supreme Court of the United States in the equity cause, pleaded and given in evidence at the trial, did not constitute a bar to a recovery by the plaintiff in this action.

The present suit is brought upon a note dated January 1, 1870, at three months, for \$1,547.00, executed by A. Grant, payable to the order of Samuel Strong, at the National Bank of the Republic.

The equity cause offered in evidence, No. 1956, was instituted by Strong against Bradley, Totten, Ellison, Ladomus, Lincoln and Willard, the trustees and beneficiaries under two deeds of trust, antecedent in date to the note sued on, against Totten and Fletcher, the trustee and beneficiary under another deed of trust, subsequent in date to said note, and against Charles and Thomas Ford the grantees in the

deeds in fee simple of two of the lots. All these were made parties defendant with A. Grant, the alleged owner of all the property, at the time certain materials were claimed to have been furnished and certain work done by Strong for Grant. The bill prayed that all the defendants might be brought before the court; that the last deed of trust and the two deeds in fee simple might be declared null and void, as having been made without consideration, and that all the property might be sold to discharge the complainant's mechanic's lien, notice of which he had filed under the provisions of Article 20 of the Revised Statutes of the District of Columbia. After answer, the defendant, Grant, under § 708 of the article, filed a written undertaking, with Wm. H. Heurtes and Calvin S. Mattoon as sureties, which was approved by the court, with the design, in the words of the act, "to release the property from the lien thereby created."

The cause afterwards proceeded to hearing; and in April, 1871, a decree was passed by the Equity Court declaring that the lien of the plaintiff was good and valid at the time of filing his notice of intention to hold the lien against the lots therein mentioned, and giving judgment against Grant, the principal, and his sureties, upon the undertaking.

On appeal to the General Term, this decree was amended by rendering judgment against Grant for the sum claimed to be due, with interest, and setting aside the decree against the sureties, Heurtes and Mattoon. The cause was taken to the Supreme Court on appeal by Grant, and on January 6, 1874, the decree of the Supreme Court of the District of Columbia was reversed with costs, and the Supreme Court of the District of Columbia was directed to dismiss the bill. A decree accordingly was passed by the last named court that the bill be dismissed with costs, and that the defendant have execution thereof, and the costs were afterwards collected by Grant.

Do these proceedings establish that the matter in controversy in the present suit is *res judicata* as between the parties thereto?

The principles governing this defense are well expressed

by the Supreme Court in *Washington, Alexandria and Georgetown Steamboat Co. vs. Sickles*, 24 Howard, p. 341, in these words: "The authority of the *res judicata*, with the limitations under which it is admitted, is derived by us from the Roman law and the Canonists. Whether a judgment is to have authority as such in another proceeding, depends, *an idem corpus sit; quantitas eadem, idem jus; et an eadem causa petendi et eadem conditio personarum; quæ nisi omnia concurrant alia res est*; or as stated by another jurist, *exceptionem rei judicatæ, obstat quotiens eadem quæstio inter easdem personas revocatur*. The essential conditions under which the exception of the *res judicata* becomes applicable are the identity of the thing demanded, the identity of the cause of the demand, and of the parties, in the character in which they are litigants. This court described the rule in *Apsden vs. Nixon*, 4 How., S. C. R., 467, in such cases to be, that a judgment or decree set up as a bar by plea, or relied on as evidence be way of estoppel, must have been made by a court of competent jurisdiction upon the same subject-matter between the same parties, for the same purpose."

It is necessary, before proceeding to apply the tests laid down by this rule to the matter before us, to consider a preliminary objection insisted on by the appellant, that we are confined to the written record in the proceeding pleaded in bar, and have no power to examine the opinion of the Supreme Court, or resort to any other means of ascertaining what was the matter really in controversy in the equity suit and actually settled by the decree relied upon.

In examining this question in the case of *Cromwell vs. County of Sac*, 94 U. S., 353, the Supreme Court says: "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be

as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." On page 354, the judge, speaking of the decision in *Newton vs. Caldwell*, 2 Wallace, says: "The court held, after full consideration, where the form of the issue was so vague as not to show the questions of fact submitted to the jury, it was competent to prove by parol testimony what question or questions of fact were thus submitted and necessarily passed upon by them," &c. In the case before it, the court was considering the effect and scope of its previous decisions in a case which was relied upon as *res judicata* in the cause then pending, and in this connection it says, on page 359: "Reading the record of the lower court (in the first case) by the opinion and judgment of this court, it must be considered that the matters adjudged in that case were these," &c.

So in 24 Howard, 344, the court declared that "extrinsic evidence would be admitted to prove that the particular question was material, and was in fact contested, and that it was referred to the decision of the jury." See also *Campbell vs. Rankin*, 99 U. S., 263 ; 1 Greenlf. Ev., § 532.

In the light of these authorities we are authorized and required to examine the opinion of the Supreme Court reported in the case of *Strong vs. Grant*, 18 Wallace, 624, with a view of ascertaining what that court really intended to settle by its decision reversing the decree below. And from that examination it appears to be too plain for controversy that the only question designed to be passed upon in that judgment was whether Strong was entitled to a mechanic's lien upon Grant's real estate described in the notice filed in the clerk's office.

The question whether Grant owed money to Strong was not contested. Indeed, it had been so fully conceded by Grant in his answer to the bill, that such a denial would have been in astonishing inconsistency with his defense. For Grant had insisted, as showing that Strong had no right to claim a mechanic's lien, that by the terms of their writ-

ten contract Strong was to look to a deed of a lot left in the hands of Totten, as an escrow, as the security for his claim, which was to be liquidated in a note. He further averred that he had been prepared to pay the note at maturity, but that Strong had assigned it to a third party who had in turn parted with its possession to some person unknown to him. That the Supreme Court could have intended by its decree to absolve Grant entirely from payment of an admitted indebtedness is inconceivable. On the contrary, that court pointed out that Strong's claim was a plain legal demand, and, therefore, not cognizable in an equity court, which is vested with no jurisdiction to collect debts recoverable at law; and hence their decree was within the category described in the case of *Foot vs. Gibbs*, 1 Gray, 413, cited in behalf of the appellant: "But if the court does not take jurisdiction of a suit in equity, but dismisses the bill because the plaintiff has an adequate remedy at law, or for want of prosecution, or otherwise, for some cause not embraced in the merits, such a dismissal is not a bar."

But apart from the language of the opinion, it is manifest from the very nature of the proceedings, that Strong's bill was not designed to perform the mere function of collecting this note. In his affidavit and account accompanying his notice of claim, no mention is made of any note. He speaks only of an indebtedness, as though still unliquidated. If his purpose was simply to recover a judgment against Grant he would naturally have resorted to a suit at law like the present. But he was not content with that form of remedy, and he sought other security than such as a judgment against Grant would afford.

The undertaking, by operation of law, was the substitute for the property thereby released from the lien; but its continuance and enforcement depended altogether upon the determination of the question whether the claim to the lien was a valid one. If the lien should be sustained, the three obligors were to respond; if not, they were to be wholly exonerated, but such exoneration could not be considered as a discharge of a note executed by the principal obligor alone.

As well might it be contended that the Supreme Court, by its decision, determined in favor of the validity of the deeds assailed in the bill as void for want of consideration.

It is evident, therefore, that the decree sought to be set up as a bar, was not made "upon the same subject-matter," and "for the same purpose;" that there does not appear "the identity of the thing demanded and the identity of the cause of the demand," required by the rules before stated.

Neither does there appear the identity of the parties in the character in which they are litigants.

In the equity cause Grant was only one of ten defendants; to the decree of the special term enforcing a compliance with the undertaking, Grant was one of three defendants. In the present case he is the sole defendant. It cannot, as matter of fact, be said that the cases are between the same defendants. And, as matter of law, it cannot be so considered. Thus it has been determined that a decree in equity in favor of two defendants upon a bill brought by one complainant for a specific performance of a contract, was no bar to an action at law by the same complainant against one of the defendants alone, to recover damages for the breach of the contract. See *Buttrick vs. Holden*, 8 Cushing, 233.

The principles governing cases like the present are very clearly illustrated in the case of *Phelps vs. Harris*, 101 U. S. Sup. Ct. Rep., 370. In that case Phelps and wife, in 1871, exhibited a bill in the chancery court of Mississippi against Harris and wife to remove a cloud from the title of the plaintiff, arising out of supposed defects in a partition made *in pais*, under a will.

The defendants relied upon the validity of the partition and will, and the question was fully contested; and in 1873 a decree was made dismissing the bill.

That plaintiffs thereupon brought ejectment against the said defendants for the same land, and in that action the State court decided that the decree in the chancery suit did not render the controversy *res judicata*; although that

decree was simply one of dismissal, "without words of qualification as without prejudice," &c., in the language of the Supreme Court in *Durant vs. Essex*, 7 Wall., 109, quoted by the appellant.

An appeal was taken from this judgment of the Mississippi court in the ejectment suit to the Supreme Court of the United States, and Mr. Justice Bradley, speaking for that court, in affirming the judgment, cites the opinion of the appellate court of the State delivered in the equity cause, as showing the scope and extent of the decree in that stage of the controversy, and the point really intended to be settled by that decision.

This very recent utterance of the Supreme Court, in our judgment, fully sustains the ruling of the court below in the present case.

We have been at special pains to examine the various questions presented by this record, because the appellant has appeared before us in proper person, and without the aid of counsel to enforce by oral argument the extensive and carefully prepared brief filed in his behalf.

His cause has received full consideration at our hands, and has in no degree suffered from any want of acquaintance on his part with the usages of the court.

For the reasons given, we think the rulings below should be affirmed.

JAMES H. COHEN vs. ROBERT COHEN'S EXECUTOR.

LAW. No. 23,065.

{ Decided February 12, 1883.

{ The CHIEF JUSTICE and Justices HAGNER and COX sitting.

1. In the absence of an express contract, the law does not imply a promise from a father to a son to pay for services rendered when the son is living with the father free of all cost for board and lodging.
2. Where the issue on trial is the value of the services of a son as clerk in his father's store, evidence of the amount of salary paid by the father to another son in the same store is irrelevant and inadmissible.
3. Where the plaintiff has taken the witness stand in his own behalf in a suit against an executor to recover the value of services rendered the testator, it is error and a good ground for a new trial if the court admit his testimony against the objection of the defendant as to statements made by the deceased relating to a matter in controversy.

MOTION for new trial on exceptions.

THE CASE is stated in the opinion.

COOK & COLE for plaintiff.

ANDREW B. DUVALL for defendant:

Where the relation of parent and child exists, the law, in the absence of an express contract, regards services rendered by a child to a parent, as acts of gratuitous kindness and affection. 2 Parson's on Contracts, 46, and notes.

In support of the 2d exception, counsel cited *Robbins vs. Harvey*, 5 Conn., 335, 341; *Thompson vs. Bowie*, 4 Wall., 463, 471; *Lucas vs. Brooks*, 436, 454.

Plaintiff's testimony in regard to alleged transactions with and statements by the testator are, in the very teeth of the statute (Sec. 858, Rev. Stats. U. S.), and subversive of its letter and spirit. *Page vs. Burnstine*, 102 U. S., 664, 669.

Mr. Justice COX delivered the opinion of the court.

This was an action of assumpsit brought by the plaintiff to recover compensation for his time, labor and services, as clerk in his father's store, from October 1st, 1876, to March 1st, 1880, three years and five months, at the rate of \$50 per month. Various credits are given which reduce the balance claimed to \$826.40.

Both the parties, plaintiff and defendant, were sons of Robert Cohen, deceased, and defendant was his executor.

At the trial, the plaintiff offered no evidence to maintain his case, except to show what the services of an ordinary good clerk in the shoe business were worth, and that during the period referred to he was seen in his father's store, apparently waiting on customers, and that he had been in the shoe business some twenty-five years. The defendant thereupon asked the court to charge the jury that upon this testimony they should find a verdict for the defendant, on the ground that no evidence was offered to show any contract between the father and son, and that the law does not imply a promise by the father to pay the son for services rendered him. We think the defendant was right in this respect, more especially as in this case the son was living with his father free of all cost for board and lodging. So that if the case had come before us simply on that exception, we should probably, on that ground alone, have been constrained to direct a new trial. But the wrong complained of here was cured by the defendant himself. After objecting that there was no proof of contract between the father and son to pay for the latter's services, the defendant took the stand and put in evidence the books of his father, in which there are distinct entries of credits for salary to the son, for his services, showing that there was a contract relation between the father and son. The book contains a credit, for instance, of nine month's salary to October 1st, 1876, at \$50 a month, and subsequent credits of \$25 a month for six months to April, 1877. After the defendant had testified in chief, he was asked, "What was your salary during that period?"; and this question was objected to, but the objection was overruled, and the evidence submitted. That was excepted to. We think there was error in that, first, because the enquiry was not pertinent to the examination-in-chief, and was not, therefore, proper cross-examination. In the next place, it was not pertinent to the issue on trial, which was the value of the plaintiff's services and the existence of any promise, express or implied, on the part of his father to pay for them.

But a more important error is disclosed in the fourth bill

of exceptions. A book having been put in evidence in which the salary of the plaintiff seems to have been reduced by his father to \$25 per month, the plaintiff then took the stand in order to testify that he had no notice of this reduction of his salary. He was asked whether his father had notified him that he had reduced his salary, and testified that his father did not notify him, but shortly afterwards he knew it, and saw the entry in the books, and his father told him it would be all right.

The purport of all this is, that his father told him that, notwithstanding this entry of a credit for reduced salary, he would be entitled to the salary that he fairly earned, or that he had been receiving before, and that it was so understood by both parties. That was objected to by the defendant. So that the court seems to have admitted the plaintiff in the case to testify as to statements made by the deceased relating to a matter in controversy; and this being within the direct inhibition of the statute on that subject (Sec. 858, Rev. Stats. U. S.), was so important an error that we do not see how the verdict can be sustained. It must be set aside and a new trial ordered.

FRANK A. COTHARIN vs. ELDRED^b G. DAVIS.

LAW. No. 23,313.

{ Decided February 16, 1883.
} The CHIEF JUSTICE and Justices HAGNER and COX sitting.

In an action on a written contract, where an alteration, though fraudulent, is alleged to have been made by one of the parties, testimony that the same party made similar alterations in similar contracts made about the same time with other parties, is inadmissible to prove the alteration of the contract sued upon.

STATEMENT OF THE CASE.

MOTION for new trial on exceptions.

The plaintiff sued the defendant for money payable by the defendant to the plaintiff, upon the following contract :

“ WASHINGTON, D. C., *May 6th*, 1879.

“ F. A. COTHARIN :

“ You are hereby authorized to insert my advertisement in the ‘ *Musical Gift*,’ to occupy $\frac{1}{2}$ column, 2d page, for and in consideration of which I agree to pay to you or order on presentation of this contract and certificate from printer as to the number printed, at the rate of ten dollars (\$10.00), for each and every 1,000 copies of the total number printed and delivered for distribution ; 500 copies to be delivered to me for free distribution. The edition not to exceed 50,000 copies. In case I do not furnish copy of advertisement for above edition within five days from above date, space may be charged for at the same rate, as though copy had been furnished.

“ E. G. DAVIS.

“ Street and No. 719 Market Space.”

The general issue being pleaded, the plaintiff, at the trial, offered evidence to prove the execution of the contract, and rested.

Whereupon, the defendant, taking the witness stand in his own behalf, swore that he would not have signed the contract had he seen the figures “ 50,000,” and was confident that if he signed it, the space where the figures

"50,000" now appears was blank, or was filled with noughts, at the time of such signature. Defendant then offered, for the purpose of showing a general scheme of plaintiff's to defraud the public, and his intent in procuring the contract with defendant, to prove by the testimony of Hart L. Strasburger, Joseph Strasburger and Meyer Strasburger, that at or about the time of the making of the contract sued upon, the plaintiff made a similar contract with said Hart L. Strasburger; and that in this last contract, also, the space where the figures "50,000" now appears was then blank, and had since been filled by some person with the said figures "50,000." To which testimony the plaintiff objected; but the court overruled the objection, and permitted the testimony to go to the jury. In like manner, and under the same objection, for the purpose of showing the same general scheme to defraud the public, and the plaintiff's intent in procuring the contract with defendant, the testimony of Charles Baum was also admitted to the effect that, at or about the time of signing the contract sued upon, the plaintiff had made a similar contract with witness, which had also a blank space where the figures "50,000" now appear, and that the contract had been afterwards altered by the insertion of said figures.

Other exceptions were also taken by the plaintiff to the instructions of the court to the jury in regard to the effect of this testimony, but as they were not passed upon by the General Term, it becomes unnecessary to state them here.

The jury rendered a verdict for the defendant.

F. W. JONES and T. JESUP MILLER for plaintiff:

The alteration, if made, was immaterial. *Angle vs. N. W. Life Ins. Co.*, 92 U. S., 330. The plaintiff had a right to fill such blank. *Sanderson vs. Seymour*, 1 B. & B., 426, and *Berwick vs. Huntress*, 53 Maine, 89, where the authorities are collated and criticised.

The testimony offered was clearly inadmissible and *res*

inter alios acta. 1 Greenl. on Evidence, 52; Carter vs. Pryke, Peake's Cas., 95.

R. R. PERRY and W. S. PERRY for defendant :

No authority to fill blanks where such filling will produce so different a liability from the one originally contracted for can be inferred from delivery. Angle vs. N. W. Life Ins. Co., 92 U. S., and Lewis vs. Shepherd, 1 Mackey, 46.

The first exception goes against the admission of the testimony of Baum and the Strasburgers, with whom contracts precisely similar to the one which the defendant signed were made upon the same day. Their testimony proved a similar subsequent alteration. Castle vs. Bullard, 23 How., 172; Butler vs. Watkins, 13 Wall., 456; McAlees vs. Horsey, 35 Md., 489.

Mr. Justice Cox, after stating the case, delivered the opinion of the court.

The defense in this case is that when the contract was presented to Davis for his signature, and that when he signed it, the figures "50,000" were not in the phrase "the edition not to exceed 50,000 copies" as it now reads; so that the contract it is claimed has been altered. It is somewhat singular that this alleged addition to the contract really had the effect of limiting and restricting instead of enlarging the liability that the instrument would have imposed if it was in the form which Davis says it was when he signed it. Without this alleged addition it was an agreement to pay \$10 for every thousand copies printed and delivered for distribution, without any limit at all; so that 100,000 or 200,000 copies might have been furnished, and under the terms of this agreement the party would be bound to pay for them, and his liability might have been twice or four times as much as claimed in this case. If any wrong was done, the probability it seems to me is that it was in omitting these words (these large figures) for the purpose of preventing the defendant's attention from being called to the magnitude of the undertaking he was entering upon. He was thus, perhaps, lulled into some security and deterred

from inspecting the instrument with the care that he ought to have exercised. Whether that folly of his is a defense or not is not a question before us, because the record limits as to the question of evidence simply.

The defendant, taking the stand himself, testified that he would not have signed such a contract had he seen the figures "50,000," and is confident that when he signed it the space where the "50,000" now appears was blank, or filled with "naughts," at the time of the said signature. Up to this point the evidence was properly enough admitted, and though not positive, it was some evidence. But in corroboration of the defendant's own evidence the testimony of several other persons was admitted to show that in two other contracts of a similar character, executed at about the same time, with other persons, there were also blanks where these figures were, at the time the contracts were signed, and that those blanks were afterwards filled up with these figures.

In other words, to show an alteration in this contract testimony was admitted to show that the plaintiff had altered two other contracts with other parties.

It must strike anybody at once that that is a very extraordinary kind of proof as tested by the settled principles of the law of evidence. The rule as stated on that subject is expressed clearly in 1 Phillips on Evidence, p. 748, as follows :

"It is considered, in general, that no reasonable presumption can be formed as to the making or executing of a contract by a party with one person, in consequence of the mode in which he has made or executed similar contracts with other persons, still less can a party be affected by the declarations, conduct or dealings of strangers. Transactions which fall within either of these classes are termed in law *res inter alios acta*, and evidence of this description is uniformly rejected. In an action against the acceptor of a bill of exchange where the defense was that the acceptance was a forgery, evidence offered on the part of the defendant that a collection of bills bearing his forged signature had been in the plaintiff's possession, and that some of such bills had

been circulated by him, was held to be inadmissible without distinct proof that the bill in suit had formed a part of that collection."

So here it seems to us very plain that evidence that other persons had dealings similar to this with with the plaintiff, and that the plaintiff had altered contracts executed with them, after their delivery to him, is totally inadmissible to show such an alteration in this particular case. There is a well-recognized exception to that rule, and that is, where the evidence relates to the guilty or fraudulent intent or knowledge—the *scienter*, as it is called, of a party. Where a man is charged with passing a counterfeit bill, and the fact of passing the bill is proved, the next question is: Did he know it was counterfeit? And evidence is admissible to show that it was no casual thing, but he had been in the habit of passing such bills. That is competent. But it was never held that a charge of actually passing a counterfeit bill could be proven in one case by showing that he passed counterfeit bills on other parties.

The counsel for the defense evidently felt the stress of this rule and appreciated the exception, as is manifest from the terms of the offer made in this case. In the printed record we find this interlineation: "And for the purpose of showing a general scheme to defraud the public and his intent in procuring the contract with defendant," &c. That was evidently done with this rule in view, that his transactions with other parties might be introduced to show fraudulent intent. But it is not the question here, whether this party had fraudulent designs on the public or on this defendant, but whether he did, in fact, make the alteration. It is just the reverse of the case I have supposed, where the fact is proved or admitted, and it is a question of intent. Here it is not a question of intent, but as to the fact. The question is: Did he actually alter this contract after it was delivered to him? And on that question this evidence is admitted. It is not aided at all by offering evidence for the purpose of proving a matter entirely immaterial; that is, a general or particular intent to defraud

We think that is a vital error, and could not but have an influence on the jury. They could hardly help inferring that he did the same thing in this case as in the others. The first exception is therefore sustained.

The second exception is an exception of the plaintiff to the rejection of a number of prayers offered by him. But, as we do not know whether the state of facts will be the same on the second trial, we do not know whether the prayers will be same or not. One of the rulings of the court in its final instruction involves precisely the same error as is exhibited in the first exception. That is, the court gave instructions to the jury to consider this evidence of third persons about transactions with them, substantially. If we are right about the first, that was an error. But for the reason already stated, it is not necessary that the details of this second exception should be considered by the court.

A new trial is granted.

PHILIP PHILLIPS vs. JAMES S. NEGLEY.

LAW. No. 22,986.

{ Decided February 19, 1883.

{ The CHIEF JUSTICE and Justices HAGNER and Cox sitting.

1. The Circuit Court has power, on motion, where proper cause is shown, to vacate its judgment and grant a new trial after the expiration of the term at which the judgment was rendered.
So held, in this case where the court on motion and cause shown vacates a judgment nearly four years after its rendition.
2. An order passed by the justice holding the Circuit Court, vacating a judgment rendered *ex parte*, at a previous term, and awarding a new trial upon the merits, is not an appealable order within the provision of section 722 of the Rev. Stat., D. C.

STATEMENT OF THE CASE.

In August, 1874, the plaintiff brought suit against the defendant upon a draft alleged to have been drawn by the defendant and one Witkowski upon Peck and Hovey, in favor of the plaintiff. The declaration averred due acceptance, demand upon the acceptors and non-payment and protest and notice to the drawer; and the non-residence of Witkowski; it contained, also, the common count for money had and received; and was accompanied by an affidavit explaining the ground of the action, and setting forth the draft and acceptance, which are as follows:

" WASHINGTON, D. C.,

"\$4,368.

May 18, 1874,

" Pay to P. Phillips the sum of four thousand and three hundred and sixty-eight dollars.

" Very respectfully,

" SIMON WITKOWSKI,

" JAS. S. NEGLEY,

Attorneys for Mrs. Witkowski.

" To CHARLES F. PECK.

CHARLES E. HOVEY."

[" Protested for non-payment Aug. 21, '74.—J. McKENNEY, N. P."]

" We accept the above order and will pay the sum therein stated out of the money received by us at the Treasury of

the United States arising from a judgment in the Court of Claims in the case of Simon Witkowski, No. 8559.

“CHAS. E. HOVEY.

“I accept on the above terms, my fees being first paid.

C. F. PECK.”

Endorsed : [“P. Phillips has this day made demand on me for payment of the within acceptance, and I answered I have received no funds with which to pay.—C. E. HOVEY, Washington, D. C., Aug. 20, 1874.”]

In the following October, the defendant appeared by Richard Harrington, his attorney, and filed a paper partaking of the general character of a plea and affidavit of defence, which contained in detail his version of the transaction. According to this, the defendant signed the draft only as attorney-in-fact of Mrs. Witkowski, with her husband, and not individually or with any intention to assume any personal liability in the premises. He insisted that the draft is the act of Mrs. Witkowski, and that he is not answerable upon the same. And further, upon information and belief, he averred that the order was given upon misinformation and under a mistaken belief that the sum of money named therein was due to the plaintiff by Mrs. Witkowski, whereas no such sum was legally and fairly due to the plaintiff. It closes with these words : “And this respondent denies that he is indebted to the said Phillips in any sum whatever, received or held by this defendant for the use of the plaintiff.

No exception was taken below to any supposed insufficiency in the form of this paper, and no further step was taken in the case until the 3d of May, 1877, when the following were filed :

“The plaintiff joins issue on said defendant’s pleas.—W. F. MATTINGLY, attorney for plaintiff.” “Last pleading filed May 3, 1877.—MATTINGLY, att’y for pl’ff.”

There was another interval of inaction until the 3d day of April, 1879, when, according to the record, the following proceedings took place :

“Now comes here the plaintiff by his attorney, Mr.

Mattingly, the defendant not appearing, and a jury of good and lawful men, to wit: Frederick W. Pratt, &c., who, being duly sworn, &c., say they find said issue in favor of the plaintiff, and that the money payable to him by the defendant by reason, &c., is four thousand three hundred and sixty-eight dollars, with interest from August 18, 1874, and costs."

"Therefore it was considered that the plaintiff recover, against said defendant, said sum with interest and costs, and have execution thereof."

Nothing further was done in the case until September, 1882, when the defendant filed a motion "to vacate the judgment and to set aside the verdict entered *ex parte* on the 3d day of April, 1879, because of irregularity, surprise, fraud and deceit, in the procurement of said verdict and judgment, and the negligence of defendant's attorneys."

Two affidavits in support of the motion were read at the hearing, one of the defendant, and the other of Richard Harrington.

Harrington swears that he was the attorney for the defendant, and filed pleas for him on the 26th day of October, 1874. That no issue was joined on said pleas or other action taken thereon at the time by the plaintiff, under the rules of the court; and affiant understood that the plaintiff had abandoned the suit, and believes he so informed the defendant. That affiant removed from the District of Columbia about March, 1875, and has not since practiced therein, and that on such removal he undertook to notify all his clients. That having considered this case at an end, by reason of the plaintiff's failure to join issue or take action on the pleas herein, as required by the rules of the court, he did not notify Gen. Negley of his removal.

That he never had any notice that issue was joined on the pleas, or that the case was set down for trial, or that judgment had been entered, until August, 1882, when he was notified by letter from Messrs. Edwards & Barnard.

That the plaintiff, and his attorney, Mattingly, well knew, when joinder of issue and note of issue were filed, that affiant

had removed from the District, and that his address was Dover, Delaware; but notwithstanding such knowledge, no notice was received by him, in any way, of the plaintiff's action in the case.

Negley's affidavit asserts in substance that he had a good and meritorious defense to the action, which was indicated in his affidavit of defense and pleas; that he owes nothing to the plaintiff; that his agency in the matter of the draft was merely as attorney, and that the plaintiff knew such was the case, and accepted the order without any intention of holding the defendant individually responsible for its payment; that affiant knew nothing of the conditional character of the acceptance, and although entitled to notice of it he received none; that at the time the suit was brought, and ever since, the affiant was a citizen of Pennsylvania; that upon recommendation, he employed Harrington as his attorney, and furnished him with the particulars of his defence; that Harrington assured him after his affidavit of defence had been filed, that the plaintiff could not recover a judgment against him; and as he heard nothing further about the case until July, 1882, he had supposed the plaintiff had abandoned it; that at the date last named he was greatly surprised at the service of a summons to appear at a court of Alleghany county, Penn., to a suit based upon the judgment in this case; that being thus notified, he made inquiries here and learned for the first time, that Harrington had left Washington city, leaving his case without counsel, and that the judgment had been rendered in April, 1879, *ex parte*, without notice to him, and, as he is advised, irregularly, fraudulently and without proof, &c.

The plaintiff and Mr. Mattingly filed counter affidavits.

The plaintiff states substantially that the defendant received the fund upon which the draft was drawn, and in disregard of his duty in the premises failed to pay the order; that the proceedings were conducted in entire good faith by him and his counsel, and that the same defenses were pre-

sented in the suit in Pennsylvania, in which the plaintiff has recovered judgment.

Mr. Mattingly states that more than ten days before the May Term, 1877, he mailed to Harrington, at the place which he ascertained was his residence in Delaware, notice that the trial would take place at that term, and a similar notice to the defendant, and concluded they were received, as the letters were not returned to affiant, although his name was printed on the envelope ; and that the case remained on the trial calendar from May, 1877, until April, 1879, when it was tried and judgment rendered for plaintiff.

The matter of the motion with the four affidavits was argued by counsel, and on the 2d of December, 1882, the justice holding the circuit court passed an order that the verdict and judgment of April, 1879, should be vacated and held for naught, and a new trial granted.

An exception was taken to this ruling of the court, and the bill of exceptions contains the defendant's motion and the subsequent proceedings.

JOHN SELDEN for plaintiff :

It is now the settled rule in equity, that a person can there obtain relief against a judgment, only when the recovery has been "*unmixed with any fault or negligence in himself or his agents.*" *Marine Ins. Co. vs. Hodgson*, 7 Cranch, 336 ; *Truly vs. Wagner et al.*, 5 How., 142 ; *Humphreys vs. Legett et al.*, 9 Id., 313 ; *Hendrickson vs. Hinkley*, 17 Id., 445 ; *Kibbe vs. Benson*, 17 Wall., 628 ; *Crim vs. Handley*, 4 Otto, 653 ; *Brown vs. County of Buena Vista*, 5 Id., 159 ; *Gott vs. Carr*, 6 G. & J., 309 ; *Saucer vs. Young*, Id., 243 ; *Union Bank vs. Poultney*, 8 Id., 324.

It is admitted even by the learned judge who decided the motion below, that it must be shown "that the interference of equity is necessary to prevent injustice which has not been brought about by the negligence or inattention of the party aggrieved." *Bohrer vs. Fay*, 3 Mac A., 150, 151.

But equity does not interfere to correct *irregularities* in judicial proceedings. It interposes only to prevent fraud or

to relieve against substantial injury or gross injustice. *Fowler vs. Lee*, 10 G. & J., 358.

In other States, this control has been assumed as a power inherent in every court.

But the rule is established in the courts of the United States, "that after the term has ended, all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify or correct them." *Bronson vs. Schultou*, 14 Otto, 415.

By Rev. Stat., D. C., section 804, the trial judge is empowered to set aside a verdict and grant a new trial, upon exceptions, for insufficient evidence, or excessive damages, but the motion must be made at the term in which the verdict is rendered. And see *Roemer vs. Simon et al.*, 1 Otto., 150.

No *continuances* were directed, as required by the act, and the omission, appearing upon face of the order, is assignable as error. *State vs. Cox*, 2 H. & G., 382; *Munnukyson vs. Dorsett, Id.*, 379; *Kemp, &c., vs. Cox*, 18 Md., 137-138.

The power exercised by the Maryland courts to vacate their judgments, after the expiration of the term, *is not conferred by the act*, though it is therein recognized.

It is treated by those courts as an equitable jurisdiction with which they are vested, inherently, without the intervention of statute, and from the nature of their functions. *Craig vs. Worth*, 47 Md., 282-3.

But even the courts of Maryland never entertain a motion to vacate the judgment, after the expiration of the term, unless under a view of all the circumstances of the case, and in the absence of all *laches* on the part of the defendant and his agents. *Craig vs. Worth*, 47 Md., 282-3; *Smith vs. Black*, 51 Id., 247; See, also, *Hill vs. Reifsneider*, 46 Id., 555.

The cases are numerous. *Green vs. Hamilton*, 16 Md., 317; *Kemp & Co. vs. Cook, &c.*, 18 Id., 130; *Henderson vs. Gibson*, 19 Id., 234; *Montgomery vs. Murphy, Id.*, 576; *Hall vs. Holmes*, 30 Id., 558; *Taylor vs. Lyndall*, 34 Id., 58;

Tiernan *vs.* Hammond, 41 Id., 548 ; Loney *vs.* Bailey, 43 Id., 10 ; Craig *vs.* Worth, 47 Id., 29 ; Abell, &c., *vs.* Simon, 49 Id., 322 ; Smith *vs.* Black, 51 Id., 247 ; Gibbons *vs.* Cherry, 53 Id., 144.

The doctrine to be extracted from them is, that in exercising an equitable jurisdiction over its own judgment, the court will act only in analogy to those principles upon which relief against the judgment would be afforded upon a bill in chancery.

It may be well said : " There is no evidence here of fraud practiced upon the defendant, and the question, and the only question, is whether there is such proof of *mistake or surprise* as will justify the court in setting aside the judgment." Abell, &c., *vs.* Simon, 49 Md., 323.

By means of the judgment, " new rights are acquired, and if stricken out, other claims may intervene, and the plaintiff may not only lose his lien, but in many cases, the entire debt." Id., p. 324.

EDWARDS & BARNARD, for defendant, cited the following authorities :

Harrison *vs.* Hardeman, 14 How., 334 ; Herbert *vs.* Rowles, 30 Md., 278 ; Stacker *vs.* Cooper Co., 25 Mo., 401 ; Millsbaugh *vs.* McBride, 7 Paige, 509 ; Freeman on Judgments, sec. 90, 97, 100.

Mr. Justice HAGNER, after making the foregoing statement of facts, delivered the opinion of the court.

The case has been elaborately argued by the counsel, and presents several questions of much interest.

1st. It is contended on behalf of the plaintiff that however the practice may be in the State courts, under the common law rules, the circuit courts of the United States have no jurisdiction to strike out one of their judgments after the expiration of the term at which it was rendered, inasmuch as such authority could be exercised by a circuit court only under express statute, and no such statute exists.

Assuming, for the present, that the courts of this District

possessed only the jurisdiction common to the other circuit courts of the United States, and are controlled by the limitations of power peculiar to such courts, we do not believe they would be without jurisdiction to correct and vacate their judgments, after the expiration of the term, upon proper cause shown.

We were referred confidently to the case of *Bronson vs. Schulten*, 104 U. S., 410, as establishing, beyond controversy, this contention of the plaintiff. But an examination of that case has led us to a contrary conclusion.

It appears from the opinion of the court that a judgment was rendered on verdict in the fall of 1858, in the Circuit Court of the United States for the Southern District of New York, in favor of Schulten and others against Bronson, collector, for the supposed amount of an overcharge of duties paid to the collector at New York city by the plaintiffs under protest.

In August, 1860, upon application of the plaintiffs, this judgment was set aside (apparently three terms after its rendition), and a new reference made; under which the judgment was so amended as to embrace thirty-four cases of erroneous charges, not comprehended in the original entry; and amount of this amended judgment was paid and accepted by plaintiffs shortly afterwards.

In December, 1876, another application was made to the circuit court by the plaintiffs to open the judgment a second time for the purpose of including a number of additional cases of over-payment of duties, not comprehended in either previous entry; and, against the objection of the United States district attorney, the circuit court in January, 1877, seventeen years after the rendition of the amended judgment, ordered it to be vacated, and sent the case to a referee to state the damages anew, as prayed. The report of the referee in the following March found still due a considerable sum, with interest to an amount almost as large as the principal, and the circuit court rendered judgment for these sums, with costs added. More than thirty-three terms of that court had passed since the entry of the amended judg-

ment; but the jurisdiction of the United States Circuit Court to open the judgment, does not appear to have been questioned in that tribunal.

On appeal, this judgment was reversed by the Supreme Court; and it is supposed that the opinion of that court, delivered by Mr. Justice Miller, announces the doctrine contended for.

If the Supreme Court had intended by that decision to settle the point in this direction, it is very astonishing it did not say so explicitly and dispose of the case in a few sentences. Surely no more flagrant case of usurpation of jurisdiction could well arise, if the position of the plaintiff is correct. Apart from the great lapse of time, and the expiration of about forty terms from that of the original judgment, and of about thirty-three terms from the date of the amended judgment, the case seems to present few equitable considerations commending it to favorable consideration. Instead, however, of disposing of it upon this obvious ground (if such is the law), the justice who delivered the opinion, and who is distinguished by his directness of expression, occupies nearly eight pages of the report in showing, as he does, conclusively, that upon other grounds the judgment should be reversed. He announces the general rule that courts have entire control over their judgments at the term at which they are rendered; and then proceeds, in the language relied upon in the argument:

“But it is a rule equally well established that after the term has ended, all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion, or otherwise, to set aside, modify, or correct them.” * * *

In the following paragraph he continues:

“But to this general rule an exception has crept into practice in a large number of the State courts in a class of cases not well defined, and about which, and about the limit of this exception, these courts are much at variance. * * This exception however has its foundation in the English writ

of *coram vobis*, a writ which was allowed to bring before the same court in which the error was committed some matter of fact which had escaped attention and which was material in the proceeding.”

After discussing at length this exception, he proceeds to state that :

“ There has grown up, however, in the courts of law a tendency to apply to this control over their own judgments some of the principles of the courts of equity in cases which go a little further in administering summary relief than the old-fashioned writ of error *coram vobis* did. This practice has been founded in the courts of many of the States on statutes which confer a prescribed and limited control over the judgment of a court after the expiration of the term at which it was rendered. In other cases the summary remedy by motion has been granted as founded in the inherent power of the court over its own judgments, and to avoid the expense and delay of a formal suit in chancery.”

And the learned judge then declares that neither the statute of New York, nor the decisions of its courts upon the subject, are binding upon the courts of the United States held therein, and adds :

“ The question relates to the *power* of the courts, and not to the mode of procedure. It is whether there exists in the court the authority to set aside, vacate, and modify its final judgments after the term at which they were rendered ; and this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a State or the practice of its courts.”

Having considered at length the grounds upon which courts of chancery interfered to set aside judgments after the term, he asks :

“ Does the power of the court over its own judgment, exercised in a summary manner, on motion, after the term at which it was rendered, extend beyond this ? ”

The court of which he was speaking was the Circuit Court of the United States for the Southern District of New York ;

and it is inconceivable that the Supreme Court would have assumed the task of examining the facts to ascertain whether they brought the case within the limits of these equitable principles, if it had intended to decide as was contended before us, that a circuit court of the United States was wholly without jurisdiction to give relief.

The judge proceeds: "We are also of opinion that the general current of authority in the courts of this country fixes the line beyond which they cannot go in setting aside their final judgments and decrees on motion made after the term at which they were rendered, far within the case made out here. If it is an equitable power supposed to be here exercised, we have shown that a court of equity, on the most formal proceeding, taken in due time, could not, according to its established principles, have granted the relief which was given in this case."

And the decision of the court, reversing the order below, was placed solely upon the ground of the gross laches of the plaintiffs, and their acquiescence during seventeen years in the correctness of a judgment which had already once been amended at their instance, and afterwards had been paid to them, when the alleged error was easily discoverable by a comparison of their own papers, during all this time. "Having been negligent originally, and having slept on their rights for many years, they show no right, under any sound practice of the control of courts over their own judgments, to have that in this case set aside."

We have examined this case at large, because of the earnestness with which it was pressed upon us as decisive of the want of jurisdiction in the United States courts in this class of cases; but in our opinion, so far from deciding the principle contended for, it may well be invoked as an authority in support of that jurisdiction.

And such we understand to have been the ruling of the Supreme Court as far back as 1824, in the case of *Walden vs. Craig*, 9 Wheaton, 576; in 1832, in *Boyle vs. Zacharie*, 6 Peters, 648; in 1833, in *Pickett vs. Legerswood*, 7 Peters, 147; and again, in 1852, in *Harris vs. Hardeman*, 14 Howard, 337.

In *Walden vs. Craig*, the circuit court of the United States for Kentucky, in 1821, refused to strike out a judgment in ejectment rendered in 1800, to enlarge the term stated in his declaration. From this order of refusal a writ of error was sued out to the Supreme Court. Chief Justice Marshall, speaking for the court, states the first question to be: "Ought the circuit court to have granted leave to the plaintiff to extend the term laid in his declaration?" And answers for the court in these words: "The cases cited by the plaintiff's counsel in argument, are, we think, full authority for the amendment which was asked in the circuit court, and we think the motion ought to have prevailed." And this after twenty years had intervened since the expiration of the judgment term.

The case in *14 Howard* is as follows: In 1839 Harris recovered judgment against Hardeman, in the Circuit Court of the United States for the Southern District of Mississippi, by default, for want of appearance. In 1840 a *fieri facias* was issued on this judgment and levied upon the property of Hardeman, and a forthcoming bond was executed by him, with sureties, to prevent the sale of the property levied on.

At the May Term, 1850, eleven years after the rendition of the judgment, Hardeman and the sureties made an application to quash the forthcoming bond and set aside the judgment on which the bond was founded, upon the ground that there had never been a proper service of process upon Hardeman in the original case. The circuit court granted the motion, and on appeal the decision below was affirmed by the Supreme Court. In speaking of the jurisdiction of the court below to strike out the judgment upon motion, the court says: "it is believed to be the settled modern practice, that in all instances in which irregularities could formerly be corrected upon a writ of error *coram vobis* or *audita querela*, the same objects may be effected by motion to the court as a mode more simple, more expeditious, and less fruitful of difficulty and expense."

The idea that courts of the United States have smaller

powers in this particular than the courts of the States does not seem to have then occurred to the Supreme Court. And it would be a most unfortunate necessity that would compel a court of the United States to declare itself powerless to set aside one of its own judgments, which had manifestly been obtained by fraud, deceit, irregularity or surprise, merely because the motion was made after the expiration of the term, and thus allow its process of execution to be prostituted by the perpetrator of the fraud to the oppression of a citizen. For if the circuit courts of the United States are without authority to interpose at law in such a case, because no statute has been passed granting the explicit authority, the sufferer would be practically remediless, since no State court could interfere in such a case with the judgment of a court of the United States. Although the exercise of this wholesome jurisdiction is regulated in some of the States by statute, we are clearly of the opinion that it must exist in every court of record as an inherent power, indispensable to prevent a failure of justice and the abuse and perversion of its judgments for unjust ends. And we can see no reason of policy or propriety why the courts of the United States should be so grievously enfeebled for good, as they would be, if this power were denied them.

An examination of such of the reports of the decisions of the circuit courts as were accessible since the argument shows that this power has been exercised by their judges from time to time. Thus in *Sheepshanks vs. Boyer*, Baldwin's C. C. R., 462, a judgment rendered by default at a previous term was stricken out on motion of an attorney, representing that he had ordered his appearance to be entered by the clerk, who had neglected to make the entry; and this without reference to merits in the defense.

In *Den, ex dem., &c., vs. McAllister*, 4 Wash. C. C. R., 393, it was decided that a judgment by default against the casual ejector for want of appearance may be set aside at a subsequent term upon good cause shown by affidavit of merits.

In *Albree vs. Johnson*, 1 Flippin, 341, a judgment was rendered in September, 1868, in the Circuit Court for the Northern Circuit of Ohio, against a female defendant named Johnson. Six years afterwards, application was made by Johnson and his wife who, according to the affidavits, was the sole defendant in the judgment, and was a married woman when it was rendered, upon the ground that it was, for this reason, void. The application was presented by petition for a writ of error *coram nobis*, and also by motion; and Walker, circuit judge, apparently entertaining no doubt as to his jurisdiction to interfere under one form of proceeding or the other, examines which is the appropriate mode of redress. After citing a number of cases on the subject (among them *Harris vs. Hardeman*, 14 Howard), he says: "These authorities, it seems to me clearly show that errors in fact can be reviewed on writ of error *coram nobis*, and that among the errors of fact against which relief will be granted, is coverture of the defendant at the time of the judgment. Can the same thing be effected by a motion for that purpose supported by affidavit?"

After a particular examination of the authorities upon this latter point, he concludes: "These cases in the Federal courts seem to settle that errors in fact may be reached as well by motion as by writ of error *coram nobis*." And the court accordingly set aside the execution which had been issued, struck out the judgment, and admitted the defendant to plead.

In *Dawson vs. Daniel*, 2 Flippin, 301, the court, while not questioning its jurisdiction to strike out a judgment rendered in the Circuit Court for the State of Tennessee, after the expiration of the term, declares that the motion will not prevail unless the defendant can show he was guilty of no negligence, and has a meritorious defence.

The unreported case of *Palmer vs. Embry*, which has been brought to the attention of the court by the plaintiff's counsel since the argument, is not in conflict with the decisions we have referred to. This was a suit in equity to set aside a judgment obtained in Connecticut upon a judg-

ment recovered in the District of Columbia, and the decision of the Supreme Court refusing the relief was based, as in the case of *Bronson vs. Schultzen*, upon the laches of the complainant, and not upon any idea of the want of jurisdiction in the United States courts to protect litigants from the fraud or misconduct of other suitors, by striking out a judgment, after the term, on motion.

2d. But even if this jurisdiction did not reside in other courts of the United States, we think it undoubtedly is possessed by the Supreme Court of the District of Columbia. It is true this is a United States court, clothed with all the ordinary jurisdiction of United States circuit and district courts ; but its power and jurisdiction are far more extensive than that of those courts.

By the act of February 27, 1801, the Circuit Court of the District of Columbia was created with "all the powers by law vested in the circuit courts and the judges of the circuit courts of the United States ;" and by the act of April 29, 1802, a district court for this District was created with all the powers and jurisdiction by law vested in the other district courts of the United States. And by various acts of Congress since 1801, further jurisdiction was committed to the courts existing within the District of Columbia. But besides this ordinary jurisdiction, the courts of the District are possessed of that large mass of powers which they received under the act of Congress declaring that the laws of the State of Maryland, as they existed in February, 1801 should continue in force here; which embraced, as decided by the Supreme Court, the common law of England, as then existing in Maryland. It was in virtue of this grant that the right of the Circuit Court of the District of Columbia to issue a mandamus was sustained in *Kendall's case*, as one of the powers incident to the highest court of common law jurisdiction, though denied to every other circuit court in the United States.

Nor is it the result of this legislation to create, as was argued, effectively *two* courts, or two separate divisions of one court ; one clothed with distinct federal jurisdiction,

and the other with the common law powers derived from Maryland. The powers are merged, and the court acts as a single tribunal with the authority accumulated from these different sources. And we hold it to be perfectly clear, that this court derived from the Maryland law, if it did not possess it in common with the other courts of the United States, entire power to strike out its judgments for proper cause shown, on motion, after the expiration of the term.

That such was the practice of the Maryland courts in February, 1801, cannot be denied. The power was expressly recognized by the act of 1787, c. 9, s. 6, as one previously existing, independently of any statute; either as a common law power or as inherent in the constitution of courts of justice. The reported cases where this power has been exercised by the courts of that State are very numerous, and in one of the later cases, *Tiernan vs. Hammond*, 41 Md., was exercised after eleven years had elapsed from the rendition of the judgment.

It therefore follows, as a necessary consequence, that the same power was possessed by the first circuit court established in the District in 1801; and has devolved upon its successors in turn.

There is abundant evidence at hand that it has been exercised on repeated occasions by our predecessors in this District.

In the case of *Sherburne vs. King*, 2 Cr. C. C. R., 205, the court reinstated an action of replevin, which had been discontinued at the previous term, because the clerk had omitted to enter the appearance of the defendant's attorney.

In *McCormick's Lessee vs. Magruder*, 2 Cr. C. C., 228, judgment was entered at December Term, 1819, against the casual ejector by default, and a writ of *habere* issued to April Term, 1821. At this term, Mr. Taney moved to quash the execution and rescind the judgment, upon affidavits that Mr. Marbury had ordered the clerk to enter his appearance before the judgment was entered, but the clerk, by mistake, had entered it in another case, and the court granted the motion, quashed the *habere* and rescinded the judgment, with leave to the tenant to plead.

In *Union Bank of Georgetown vs. Crittenden*, 2 Cr. 238, judgment was entered at June Term, 1820, for want of a plea, and at April Term, 1821, Mr. Redin moved to quash the execution and set aside the judgment because the clerk had omitted to enter an appearance for the defendant, although directed to do so by an attorney. Mr. Jones resisted the motion and insisted that a court will not correct its judgment after the term; but the court, *nem. con.*, granted the motion.

In *Ault vs. Elliott*, 2 Cr. C. C., 372, a judgment was entered by confession against Morte, at December Term, 1819, without a declaration or rule to declare or plead. At the April Term, 1823, a *sci fa.* was returned against Elliott, who was special bail for Morte; and Mr. Redin moved to set aside the original judgment for the irregularities mentioned, and to quash the proceedings against the bail; and the court ordered accordingly at the June Term, 1824, four years and six months after the entry of the judgment.

In *Ringgold vs. Elliott*, 2 Cr. C. C., 462, judgment was rendered for Ringgold in an action of replevin brought by Patterson at October Term, 1823. Ringgold brought suit against Elliott as surety on the replevin bond, and at April Term, 1824, Elliott moved to set aside the judgment in the replevin suit, because the verdict was rendered in that case at the trial, without a declaration having been filed. The court ordered the judgment to be set aside.

In the same volume, page 682, is to be found the case of *Baker vs. Glover*. This was a bill in equity brought at the May Term, 1826, by the complainant and another, as garnishees of Smith. It averred that at June Term, 1818, a judgment of condemnation by default was entered against the complainants as garnishees; that they had failed to appear through ignorance, relying upon the fact that they had no funds of the defendant Smith in their possession; and that the proceedings were irregular and void for various reasons; and the bill prayed for an injunction to restrain the levy of an execution issued upon the judgment.

After answer it was contended by Mr. Morfit, upon the

argument, that the complainants had no redress in equity, as they had a full remedy at law by motion to strike out the judgment at law against the garnishees for irregularity and surprise. Mr. F. S. Key, who had filed the bill, thereupon made a motion to quash the execution and set aside the judgment for irregularity; but the case abated before hearing, by the death of the defendant. The report is instructive as showing that Mr. Key made no reply to the argument that his remedy was at law by motion to strike out the judgment, which, if correct, would have been fatal to his bill, thus conceding the correctness of Mr. Morfit's position, although nearly eight years had elapsed since the rendition of the judgment of condemnation.

In *Reiting v. Bolier*, 3 Cranch, 212, at the December Term, 1827, the defendant's counsel moved to set aside an interlocutory judgment by default and quash a writ of inquiry issued at the preceding term, upon affidavit of merits, &c. The court, upon examination of the cases in the District, including some not referred to by us, granted the motion.

What were the views of the old circuit court on this subject, therefore, admits of no doubt. Nor can there be a question that this court, as now constituted, has repeatedly exercised the same power without question. In the unreported case of *Palmer vs. Embry*, before referred to, it appears that the judge holding the circuit court struck out a judgment rendered in the course of that litigation, after the term had passed. The Rules Nos. 89 and 90 recognize the motion with reference to the causes specified in the Maryland act of 1787, ch. 9, § 6; and evidently refer, as that act did, to motions made after the expiration of the term.

So far, then, from holding that the act of Mr. Justice Mac Arthur in taking jurisdiction of the motion to vacate the judgment, was an usurpation of authority on his part, as asserted in the argument before us, we have no hesitation in declaring that he was exercising a plain power of the court, as undoubtedly belonging to him as any other jurisdiction with which the Supreme Court of this District is endowed.

3d. The next question arises upon the motion of the defendant to dismiss the appeal.

The order below vacated the judgment rendered *ex parte*, and awarded a new trial to the defendant upon the merits. Is this an appealable order, within the meaning of the provisions of sec. 772 of the Revised Statutes of the District of Columbia, which declares that "any party aggrieved by any order, judgment or decree, made or pronounced at any special term, may, *if the same involves the merits of the action or proceeding*, appeal therefrom to the General Term of the Supreme Court?" And this depends upon the fact whether the order of the court below was one *which involved the merits of the action or proceeding*, within the meaning of the statute.

It is plain that the justice, by passing the order, neither decided that the defendant was entitled to a verdict, nor that the plaintiff had no right to recover upon the merits. His order was predicated of the idea that there had in fact been no real hearing of the case; and its purpose was to enable the parties to obtain what the law was designed to secure them—a trial upon the merits. The rulings of the court upon questions of law *in such a trial*, would involve the merits of the action; but an order that the case should be placed in a position where such rulings might be had, cannot in any just sense be so considered. In loose words, almost any interlocutory order in a case, as for a continuance, a bill of particulars, an amendment of pleadings, a rule security for costs, or an order overruling such motions, may, when tested by the result in the particular case, be said to have *affected* the merits; since the subsequent judgment may appear to have been the consequence of the order complained of. But by no just use of language could it be said that the final determination of the case on its merits was *involved* by such interlocutory order, since the decision upon the merits, by court or jury, would be entirely unaffected by any such antecedent incidental proceedings.

The definition of the word "involve," which would best support the idea of the appealability of the order, is, "to connect by way of *natural* consequence or effect;" and this could not be held to embrace an order merely authorizing

the parties to present their proofs before a jury which is to render a verdict according to the justice of the case, without knowing, necessarily, that there had ever been a previous *ex parte* trial and verdict. It seems a contradiction of terms to declare that an order *directing a hearing* upon the merits, because the merits had never been heard, is in fact an order *involving* the merits; and this view seems to be plainly in conformity with the practice of this court, in kindred cases. Our General Rule, No. 60, contains an enumeration of the grounds upon which a party may move for a new trial; and among them are: 1st. That the party moving for the new trial had no notice, and did not appear at the trial." 2d. "Misbehavior of the successful party." 6th. "That the verdict was obtained by surprise." Each of these grounds is relied upon in the present motion. The rule proceeds: "These motions are addressed to the discretion of the justice presiding at the trial, and are not appealable." Although the rule was designed especially to apply to motions made shortly after the trial, the order before us would seem to be properly within the reason of its sensible provisions.

But apart from this rule, the practice of this court does not support the idea that this is an appealable order.

In *Driggs vs. Daniels*, 2 Mac A., 255, the plaintiff applied for an order directing the delivery to his solicitor of \$25,000 of certificates deposited with the clerk under a stipulation that they should be held subject to claims of creditors for a specified time which had expired. It seems that the creditors had filed their claims in another suit; but the plaintiff insisted that as they were not filed in the principal case, he was then entitled to the certificate. The court below refused to pass the order, and an appeal was taken, and on motion, was dismissed by the court, which said: "The order appealed from determines no question involving the merits of the action. The refusal to deliver the certificates is an intermediate proceeding, and its regularity can only come before us on a final judgment or decree."

In *Adams vs. Adams*, 2 Mac A., 276; the lower court passed an order overruling a motion that a trustee be re-

quired to give bond and be restrained from selling the trust property without the previous order of the court. An appeal was taken from this order to the General Term. An application was there made to dismiss the appeal for the reason that the order below did not involve merits of the action or proceedings. "The court was of that opinion and the appeal was accordingly dismissed."

So in *Bryan vs. Sanderson*, 3 Mac A., 402, it was decided that no appeal lies from an order awarding or refusing a writ of assistance. And in *Parson vs. Parker*, 3 Mac A., 9, a similar ruling was made with respect to orders overruling or sustaining demurrers, with leave to amend or answer over.

The order in each of the cases cited may possibly have proved fatal to the recovery of the party against whom it was passed, but such would not be its "natural consequence or effect." In *Parson vs. Parker*, Mr. Justice Olin defines the terms employed in section 772, as follows: "An order, judgment or decree involving the merits of a case is therefore such and such only, as, if not set aside or reversed, will put an end to the suit or controversy. To hold the contrary would render every order made either at law or in equity appealable. It is difficult to conceive that any order made in the course of judicial proceedings may not, to some extent, in a greater or less degree, affect the merits of the case."

That a motion for a new trial, at common law was addressed to the sound discretion of the presiding judge, and was not appealable, has been recognized by this court as a factor in its construction of the law of appeals.

Philips vs. Gardner, 1 Mac A., 165; *U. S. vs. Wood*, 1 Mac A., 241.

In the Supreme Court, in the case of *Connor, alias Van Ness, vs. Peugh's Lessee*, 18 How., 395, a motion was made to dismiss an appeal taken by Mrs. Connor from the refusal of the Circuit Court of the District of Columbia to set aside a judgment at law rendered against her at a previous term, and quash the execution thereon. The motion prevailed, and Mr. Justice Grier, announcing the judgment of the court

said : "The motion afterwards made to have the judgment set aside, and for leave to intervene, was an application to the sound discretion of the court. To the action of the court, on such a motion, no appeal lies, nor is it the subject of a bill of exceptions or writ of error."

It is worthy of notice that the able counsel in that case, who opposed the motion to strike out the judgment, made no suggestion of any want of jurisdiction in the circuit to pass such an order.

In *Wylie vs. Coxe*, 15 Howard, 1, an appeal was taken from the refusal of the circuit court of this District, in equity, to open a decree and grant a rehearing. In discussing this appeal, the Chief Justice says : "In relation to the order, it is plain that no appeal will lie from the refusal of a motion to open the decree and grant a rehearing. The decision of such a motion rests in the sound discretion of the court below, and no appeal will lie from it."

These decisions are in entire sympathy with numerous cases in the Supreme Court where that tribunal has refused to entertain appeals from orders or decrees which did not "put an end" to the suit below, and were therefore not final in the sense of the act of 1789 ; and because the passing of the order was within the sound discretion of the court below, and therefore not examinable on appeal.

Thus in *Walden vs. Craig*, 9 Wheaton, 576, before referred to, after stating that the court below should have granted the motion to amend the judgment, Chief Justice Marshall said : "But the course of this court has not been in favor of the idea that a writ of error will lie to the opinion of a circuit court, granting or refusing a motion like this. No judgment in the cause is brought up by the writ, but merely a decision on a collateral motion, which may be renewed. For this reason the writ of error must be dismissed."

Again, in *Boyle vs. Zacharie*, 6 Peters, 648, it was held that the refusal of a circuit court of the United States to quash a *vend. exp.* was no ground for a writ of error to the Supreme Court. The court said : "We consider all motions of this sort to quash executions as addressed to the sound

discretion of the court, and as a summary relief which the court is not compellable to allow."

In *Pickett vs. Legersawood*, 7 Peters, 147, a writ of error was brought from the judgment of the Circuit Court for Kentucky, rendered on a writ of error *coram vobis*, correcting an error in a judgment given at a previous term of that court.

"The motion here," says Mr. Justice Johnson, "is to quash the writ of error, upon the ground that it is an exercise of jurisdiction in the court below which does not admit of revision in this tribunal, * * * and is therefore subject to the same exceptions which have always been sustained in this court against revising the interlocutory acts and orders of the inferior courts."

The court proceeds to state that the writ of error *coram nobis* is now generally superseded by motion; that the proceeding, where in force, "is not one of those remedies over which the supervising power of this court is given by law;" and, in conformity with the decision in *Walden vs. Craig*, declares that the judgment of the court below opening a judgment rendered many years previously, could not be examined, in error, by the Supreme Court. See also *Van Ness vs. Van Ness*, 6 Howard, 62; *Grant vs. Phoenix Ins. Co.*, 106 U. S., 429.

4th. The order below does not require the continuances to be entered on the docket, as is directed by the act of 1787, ch. 9, sec. 6, and it is insisted that this omission is assignable as error.

The point is immaterial at this stage of the case, but as matter of practice it may be said that it would be proper such entries should be made on the docket before the case goes to trial again: though the want of the continuances is aided by the appearance of the party. 2 Sellon, 336.

They can perfectly well be made now, and without any injury to the plaintiff. In the two cases in 2d Harr. & Gill, cited by the plaintiff's counsel, the court below had ordered the judgments to be stricken out, without directing a new trial to be had, and the plaintiff would therefore have been

compelled, in those cases, "not only to pay the costs of the action, but to begin *de novo*," exposed to the chances of a plea of the statute of limitations. Such is not the predicament of the plaintiff here, for the order expressly directs the case to be tried anew.

The appeal is dismissed.

CAROLINE NELSON vs. CHARLES E. HENRY ET AL.

EQUITY. No. 7968.

{ Decided March 30, 1883.
} Justices Cox and JAMES sitting.

1. A deed of bargain and sale of real estate not recorded within six months from its date, and containing no trust expressed upon its face, is void against creditors whose judgments were obtained prior to its record, although subsequent to the date of the deed.
2. While it is true that a judgment creditor does not levy upon any other or better title than that which the debtor has, and that he takes it subject to all outstanding equities, yet the Statute of Frauds has made it necessary that any trust attaching to property in the hands of an ostensible owner shall be expressed in writing.
3. The rule established by the Statute of Frauds and the registry laws is, that the creditor is entitled to pursue the ostensible title even though it may not be the real title of the debtor.

STATEMENT OF THE CASE.

Appeal from a decree of the Special Term.

Daniel Nelson, being seized and possessed of lot 29, in a subdivision of square 898, in the District of Columbia, conveyed the same on the 25th day of May, 1877, by a deed duly recorded, and absolute on its face, to A. A. Marr, the intention being to vest the title in Nelson's wife, Caroline, by a deed to be subsequently made to her by Marr. In pursuance of this intention, Marr, on the 6th of June, 1877, executed to her a fee-simple deed of the property, but did not place it upon record until the 2d day of August, 1881. In the meantime a judgment was obtained on the 6th of April, 1881, by Ringwalt & Hack against Marr, and on the 30th of August, 1881, a *feri facias* was issued thereon, and a levy made by the United States marshal, Charles S. Henry, upon the property described. Whereupon Catherine Nelson filed this bill,

setting forth the above facts, and claiming the property as her separate estate, and alleging that no title existed in Marr, the conveyance having been made to him as trustee for the purpose of conveying the property to plaintiff. The bill concluded with a prayer that the judgment be declared no lien upon the property, and that the defendants be perpetually enjoined from selling the same, and for general relief.

The answer of the defendants, Ringwalt & Hack, denied that the property was the separate estate of plaintiff; admitted the execution of the deed from Nelson to Marr, but denied that he held the same as trustee for the purpose of making a conveyance to plaintiff, or for any other purpose than that expressed upon the face of the deed itself. They averred that said declaration of trust was not in writing, and claimed the benefit of the Statute of Frauds; that the indebtedness represented by said judgment was contracted by Marr after said conveyance to him, and while the records showed that he was the legal owner thereof, and on the faith of such ownership unusual forbearance and indulgence was granted him by defendants touching said indebtedness, both before and after said suit at law was begun, and even after said judgment was obtained; that they incurred great expense in bringing said suit at law, and in marshal's fees, advertising, etc., which they would not have done had they received notice that said Marr had no interest in said property.

The answer of the defendant Marr admitted the substantial allegations of the bill. The defendant Henry disclaimed any knowledge of the material parts thereof, and neither denied nor admitted the same; he admitted that he held the office of marshal, and that he levied on said real estate by virtue of said *fi. fa.*, and caused the same to be advertised for sale.

The facts, as stated by the bill, were substantially proved by the evidence; and on the hearing the court below passed a decree enjoining the defendants as prayed and declaring

the judgment no lien upon the property. From this decree defendants appealed.

T. F. MILLER and CHARLES PELHAM for complainant.

C. M. MATTHEWS and E. A. NEWMAN for defendants :

The trust attempted to be established in this cause is an express trust, and not a "trust or confidence" contemplated by section 8 of the Statute of Frauds.

As to what are resulting trusts see *Browne on Statute of Frauds*, secs. 80 and 84 ; *Parker's Heirs vs. Bodeley*, 4 Bibb, 102 ; *Osterman vs. Baldwin*, 6 Wall., 128.

Being an express trust, under the Statute of Frauds, it must be "manifested or proved by some writing signed by the party who is by law enabled to declare such trusts." Statute of Frauds, sec. 7.

Assuming, for the sake of argument, that the trust alleged in the bill could be proved by parol, the testimony in this cause is insufficient to warrant a court in passing a decree, the well-settled principle being that where the defendant in express terms negatives the allegations in the bill, and in the evidence only *one* person affirms what has been so negatived, the court will not make a decree. 1 Dan'l Ch. P., 843 (note 7) ; *Morrison vs. Shuster*, 1 Mackey, 190.

The complainant has no separate estate in said real estate, having according to her bill, acquired the same during her marriage by gift and conveyance from her husband. She can, therefore, maintain no suit in reference thereto. Revised Statutes (D. C.), sections 727-8-9.

The judgment rendered April 6th, 1881, is a prior lien to the deed from Marr to Nelson, dated June 6, 1877, and recorded August 2, 1881. Revised Statutes (D. C.), secs. 446, and 447 ; Act of Congress, April 29, 1878, Statutes at Large, vol. 20, p. 39 ; *Hill vs. Paul*, 8 Mo., 482 ; *Reed vs. Austin Heirs*, 9 Mo., 722 ; *Knell vs. Building Association*, 34 Md., 71 ; *Helm vs. Logan*, 4 Bibb, 78 ; *Sicard vs. Davis*, 6 Peters, 124 ; *Freeman vs. Douglass*, No. 6,071, Eq. Doc. 18.

Without multiplying authorities, we assert that in the fol-

lowing States the principle has been adopted that a deed or mortgage, though valid without record, as between the parties and their heirs, is not valid as against even the process of the grantor's creditors without notice, except from the time of recording, viz., Ohio, Massachusetts, New Hampshire, Vermont, Rhode Island, Minnesota, California, Colorado, Kansas, Arkansas, Kentucky, Tennessee, Louisiana, Texas, Florida, North Carolina, Virginia and West Virginia.

In all other States where a different doctrine prevails, the statutes do not protect a judgment creditor of the grantor from the effect of a prior unrecorded deed or mortgage as the statute in this District does.

Mr. Justice Cox delivered the opinion of the court.

In this case we are constrained, with no little reluctance, to reverse the decision below and award the decree in favor of the judgment creditor. We feel reluctance in doing this because the case is a very hard one. A man named Nelson, represented as a poor and ignorant man, conveyed certain property to a third party, with the understanding that it should be reconveyed to his (Nelson's) wife. The deed from Nelson was put on record, but the deed to his wife was not recorded for three years after its date. In the meantime, certain parties obtained judgment as creditors against the grantee, and levied on the same property, and this bill was filed by Mrs. Nelson to restrain action on that judgment. Under the law in regard to registration, as it has been held by the Supreme Court of the United States, and by a number of other courts, we are satisfied that this deed back to Mrs. Nelson must be treated, as regards the judgment creditor, as if it had no existence; it has no operation as against such creditor, except from the time it was actually recorded. If it had been recorded within six months, it would have operated from its date; but it was not recorded for over three years, and, therefore, as against a judgment creditor, it is simply void, and the property must be regarded as if it had remained in the trustee, and was his property. It is true that the judgment creditor does not levy upon any

other or better title than that which the debtor has, and that he takes it subject to all outstanding equities ; but the Statute of Frauds has made it necessary that any trust attaching to property in the hand of an ostensible owner, shall be expressed in writing. We have sought to find, in the deed back to Mrs. Nelson evidence of a trust for her benefit, but we have been unable to find it. It purports to be simply a transaction of bargain and sale for a money consideration ; if that be evidence of a trust, then in all such cases, where deeds have been held void as against creditors, they ought to have been held to contain evidence of a trust : which has not been the case. This deed is no evidence of anything beyond what it purports on its face to be ; and taking the Statute of Frauds and the registry laws together, the rule which they establish is, that the creditor is entitled to pursue the ostensible title, even though it may not be the real title of the debtor. The case is a hard one, but at the same time it is no harder than if the trustee had sold the property to a third party for value, without notice ; in which case there is no question that the equity of the purchaser would prevail over that of the *cestui que trust*. The decree is set aside and the bill dismissed.

[NOTE.—A motion for leave to reargue this case was, on June 27, 1883, overruled.]

CATHERINE TIERNEY

vs.

FRANK E. CORBETT AND ISRAEL C. O'NEAL.

LAW. No. 22,854.

{ Decided February 26, 1883.

- { The CHIEF JUSTICE and Justices HAGNER and COX sitting.

1. Declarations of the vendor or assignor made subsequently to the transfer of property by him are not admissible in evidence for the purpose of impeaching such transfer.
2. Where the vendor took the property to the presence of the vendee, told her it was hers, gave her a bill of sale, and took a dollar apparently to bind the bargain, and the vendee thereupon asked the vendor to retain and take care of the property for her, this is a delivery constructively and symbolically if not actually.
3. Under the Maryland act of 1729, ch. 8, sec. 5, in force in this District, an executor or administrator, as such, cannot assail any transfer of property which would be good against the deceased were he living; any rights which they may have as creditors to impeach the transaction must be pursued by them in that capacity.
4. Form of judgment for plaintiff in an action of detinue.
5. A judgment in detinue if improperly entered, may be reformed by the general term so as to be according to the precedents, without sending the case back for a new trial.

MOTION for new trial on exceptions.

THE CASE is stated in the opinion.

T. JESUP MILLER and R. B. LEWIS for plaintiff.

EDWARDS & BARNARD for defendant :

Mr. Justice COX delivered the opinion of the court

This was an action rather unusual in form, but yet justified by precedent perhaps, for the wrongful detention by the defendants of certain property belonging to the plaintiff, consisting of horses and a carriage.

The facts relied upon and claimed to have been established by the plaintiff are that this was formerly the property of the Spanish Minister at Washington, who, on leaving this country, sold the horses and carriage to his own coachman who afterwards sold it to Edward Strong, and gave him a bill of sale dated the 6th of April, 1879, and, on the same day, Strong, for the consideration of one dollar, bargained, sold and conveyed to Catherine Tierney, the plaintiff, the same property. It seems that Strong was then engaged to be married to the plaintiff, who was employed as cook in

the family of Judge Bartley. In the language of the plaintiff, who was on the witness stand, Strong told her that he had bought this property for her ; he went to Judge Bartley's and called her out on the porch and told her it was hers ; he delivered to her a bill of sale, and she gave him a dollar and told him to drive the coach and take care of it. After Strong gave the plaintiff the bill of sale, she put it in a trunk and kept it for a long time, and on one occasion she gave it to Strong for a special purpose and never got it back until after Strong's death. Strong gave money to the witness at various times, and after Strong's death the carriage and horses were kept in Judge Bartley's stable.

On the other hand, the defendants claim that Strong retained possession of the property up to the time of his death ; that he made a will just before his death, and that if the plaintiff derived any title from him at all, she derived it from this will, and not from the alleged bill of sale or gift, made some time before ; that after the execution of this bill of sale, one Crusor obtained a judgment against him before a justice of the peace for forty dollars for feed furnished these same horses, and about six months after Strong's death, the will meanwhile never having been established, or even offered for probate in the orphan's court, Crusor having obtained judgment against Strong, as stated, applied to the court, as creditor, for letters of administration against Strong's estate, and on those letters took this property out of the possession of Tierney. Having obtained an order from the orphans' court for sale, he took the property to Alexandria and it was there purchased in good faith by the defendants.

The will of Strong is also put in evidence, in which, in general terms, he gives and bequeaths to Catherine Tierney "any and all personal property of whatsoever description that may now be in my possession, or that may hereafter come into the hands of my executor," &c.

The theory of the defense was, that this transaction, on which the plaintiff relies for her title, was not a valid one, and the only title she could derive must be under the will of

Strong, and taking it in that way, she must take it in subordination to the claims of creditors; and the will not having been probated, Crusor, having taken out letters of administration, being a creditor, could pass title to the defendants.

At the trial of the case, on cross-examination of the plaintiff's witness, the defense offered to prove that Strong, while his will was being prepared and signed, stated that the property referred to in that will was the property referred to in this suit, that is, the horses and carriage. That was excluded, and this was the subject of the first exception. On offering testimony for the defense, it was attempted to be shown that Strong made a declaration at the time he made his will that he was making the will in order to give the horses and carriage to the plaintiff. That was excluded and was the subject of the second exception. So that the first and second exceptions are substantially on the same point, that is, in relation to the exclusion by the court of declarations made by Strong at the time he was making the will, applying the terms of the will to this specific property.

It is said on behalf of the defendant that oral declarations of the testator made before and at the time of the executing of the will, are always admissible for the purpose of identifying the property as between parties claiming under the will—that is different legatees, or legatees and next of kin. We have no occasion to dispute the general proposition that the declarations of the testator are admissible simply for the purpose of settling the identity of property claimed under the decedent. But that is not, really, the purpose for which the declarations were offered here. They were offered here really to show, in substance, a continued assertion of title to this property by Strong up to the time of his death, and indirectly to show title in him at that time, for the purpose of bringing this property under the operation of the will, and therefore in subjection to the claims of creditors. The plaintiff having offered evidence tending in the first instance to show a prior assignment to her, either in the shape of

gift or sale, these subsequent declarations of the deceased are offered for the purpose of impeaching his own alleged transfer. In other words, they are offered in derogation of his own act of assignment, whether by gift or sale.

We think it very clear that the *ex parte* declarations of a party made subsequent to an alleged assignment are not to be proved in impeachment of that assignment. Therefore the court was right in excluding this testimony. These exceptions could not be sustained.

The next exception is to an instruction of the court given at the instance of the defendant. The court said, "if the jury believe from the evidence that the right of property in the carriage, horses and harness, mentioned in the declaration, was transferred by Edward Strong in his lifetime to the plaintiff, Kate Tierney, the personal representative could only succeed to such rights of property as Edward Strong himself had; and taking possession of the said property by the personal representative could not divest the plaintiff of her rights." That was objected to. In other words, if the property was regularly transferred in the lifetime of Strong to the plaintiff, Strong's representatives could not interfere with her title. No ground was stated for the objection to this instruction, and the terms in which it is couched are unobjectionable as a proposition of law. The objection now taken is, that it virtually submitted to the jury the determination of a question of law, that is whether the right or title in the property was transferred by Strong in his lifetime to the plaintiff. This supposed vagueness or defect in the instruction, the defendants' counsel undertook to remedy himself, by asking the court to instruct the jury that the supposed state of facts did not amount to a transfer of property from Strong to the plaintiff. But that instruction contained several distinct propositions, and it is admitted in argument now, that it is too broad, and this exception to the refusal to grant it is not insisted on. But the judge below went on to correct the supposed fault in his instructions by charging what facts would amount to a transfer of the property. He said :

"The issue has been much narrowed by the rulings of the court upon the prayers asked by the parties, so that all the jury will have to pass upon is, as to whether there was a sale of the property in controversy by Strong to the plaintiff, so as to transfer the title to the plaintiff during the lifetime of Strong. The property was purchased by Strong with his own funds, and it is claimed that on the same day he bought it he sold it to the plaintiff for one dollar, and gave her the bill of sale in evidence. * * * Now it is for you to determine whether a sale of the property from Strong to the plaintiff ever actually took place; and, if so, whether it was a *bona fide* sale. If you find that it did, then she was the owner of the property before Strong died; and whether she actually took possession or not, her ownership gave her the right to possession, and she could have taken possession at any time; and she actually took possession after Strong's death."

This proposition in the charge, taken together with the instruction, amounts simply to this, that if the jury should find a *bona fide* sale from Strong to the plaintiff in his lifetime, then the property was transferred, and, if they so found this transfer of the property, the personal representative of Strong, after his death, could not interfere with the title. So that, so far as the first instruction was defective in submitting a point of law to the jury, it was corrected by this additional instruction in the charge.

But it is objected that the court should have gone further, and have said to the jury that this was not a case of sale at all, but a case of gift, and was defective as a case of gift by failure to deliver the property, inasmuch as there was no evidence of delivery in this case. The answer to that, in the first place, is, that no exception was taken to this part of the instruction, and it is too late now to make that objection. But in the next place, we think the court would have rightfully refused to give that instruction if it had been asked. The circumstances are that Strong took this carriage to the presence of the plaintiff and told her it was hers, and gave her a bill of sale, and took a dollar, apparently to bind

the bargain, and she thereupon asked him to retain it and take care of it for her. Now, if these facts were believed by the jury, it seems to us that they amounted to delivery, constructively and symbolically, if not actually. As to creditors, it would be a question of *bona fides*; but on the question of delivery to consummate a gift, it seems to us that we have here the elements of delivery if the facts are to be believed by the jury, and that the court could not be found fault with now for not having instructed the jury to the contrary. We think the objection to the instruction of the court in that it did not declare this to be a gift, and imperfect as wanting in the element of delivery, is not tenable, and that the court cannot be found fault with now for having omitted to give that instruction.

The only other exception relates to an expression at the close of the charge. The court said :

"The bill of sale was not acknowledged and recorded, and the possession of the property was allowed to remain with Strong while he lived; and if he had creditors at the time of the bill of sale, the failure to comply with the law in this respect would have rendered the sale void as to such creditors. But it is claimed there were no creditors of Strong at this time, and if that is true, then I instruct you that the failure to acknowledge and record the bill of sale within twenty days will not render the bill of sale void. It would be valid as between the parties, and in fact as to everybody else, if there were no creditors. There is evidence that Strong owed Crusor for feed for the same horses, but that bill was contracted after the alleged time of the bill of sale to the plaintiff."

To that portion of the instruction which states that the bill of sale would be valid as between the parties, and, in fact, as to everybody else, if there were no creditors, exception is taken. In the exception, are these words in parenthesis, in the language of the court, "the possession remaining in the vendor, and the bill of sale not being acknowledged and recorded in twenty days." In other words, the exception is, that if the property remained in possession of

the vendor, and the bill of sale was not recorded within twenty days, the court was wrong in saying that it would be valid as between the parties, and, in fact, as to everybody else, if there were no creditors. If these words be taken alone from the charge, they make an unimpeachable proposition of law, because the bill of sale is good as between the parties, and the exception is faulty in not being more specific. I think there probably was a little mistake in the form in which it was taken as presented in the record. It is probable that the court was understood to say that if the possession remained in the vendor, and the bill of sale was not recorded within twenty days, then, under the statute, it would be valid as against *subsequent* creditors. I will assume that to be the proposition; let us see how that affects the case. Supposing that the court ought not to have said that the bill of sale was valid as against *subsequent* creditors while possession was retained and the bill of sale never put on record. Suppose that to be the error. If the proceeding under which these parties derived title had been a proceeding by creditors as such, then it would become a very material question whether the bill of sale was valid as against subsequent creditors or not. But, in point of fact, the proceeding was by administration, and the title is derived entirely through a supposed administration of the estate of Strong. Crusor took possession of the property *qua* administrator, and undertook to sell as such and pass title as administrator, so that the question is, is a bill of sale void as against creditors, void as against an administrator? Is the latter a representative of creditors? That is a very serious question, and it requires some examination. The act of assembly of 1729, ch. 8, sec. 5, provides that "no goods or chattels, whereof the vendor, mortgagor or donor shall remain in possession, shall pass, alter or change, or any property thereof be transferred to any purchaser, mortgagee or donee, unless the same be by writing, and acknowledged before one provincial justice, or one justice of the county where such seller, mortgagor or donor shall reside, and be within twenty days recorded in the records of the same county. Nothing

in this act shall extend or be construed to extend to make void any such sale, mortgage or gift against such seller, mortgagor or donor, his executors, administrators or assigns only, or any claiming under him, her or them."

Unquestionably the assignment could not have been disputed by Strong himself in his lifetime, but can it be assailed as void under the act of assembly of 1729 by his administrator? On this question we cannot pursue a safer course than to be guided by the decisions of the Court of Appeals of Maryland, which have been rendered from time to time during fifty years past, in the construction of this statute; and they have said emphatically that not only the donor but his personal representative cannot impeach a transaction of that sort, however creditors might assail it. The question immediately suggests itself what remedy has a creditor under these circumstances if the creditor cannot sue the administrator? The court of appeals lay down two courses for the creditor to pursue. In the first place he may sue the fraudulent assignee of the deceased as executor *de son tort*.

And they go further and say that if the personal representative is himself a creditor (which was this case) that does not prevent him from pursuing the property by this same proceeding in the character of creditor, but not as administrator. This very question was decided in 6 Harris & Johnson, 61. In that case a man had made a bill of sale to his own son. The executor, who was also a creditor, took possession of the property, and the son brought an action to recover it, which was sustained.

That was a case where the donee under the unrecorded assignment was not a defendant taking possession, but was a plaintiff seeking to recover, and the court sustained his title against the executor, and said that the latter, as creditor, had no right to take possession of the property, and as executor he was bound by the act of his testator.

It is followed by other cases unnecessary to refer to in detail.

Another remedy suggested is that a creditor may file his

bill against the executor and the fraudulent assignees together and have the property applied to debts.

So that we are constrained by the authorities to hold that Cruser, in this case, as administrator, could not interfere with this property, and could not, therefore, take possession of it and pass title—and since the only title derived was from him as administrator, the court did no harm to the defendant if it erroneously asserted that the assignment was good as against subsequent creditors.

The only question remaining is in regard to the form of judgment in the case. The motion by defendants was to correct the entry of judgment by making the same in the alternative, that the defendants return the property or pay the damages assessed, which motion was overruled, and the defendants appealed to this court. We must follow precedents in this case, and the precedents show there was an error in the form of this judgment. The form in which a judgment is rendered in this kind of case is found in Harris' Entries, p. 200, as follows :

"The jurors do say that the said D. "detains from the said P. the within writing obligatory in the declaration aforesaid mentioned, in manner and form above specified, as the said P. above against him both complained, and they do assess the damages of the said P. for the value of the said writing obligatory to £100 current money, and they do also assess the damages of the said P. by reason of detaining that writing obligatory to £10 current money, therefore it is considered by the court here that the said P. recover against the said D. the aforesaid writing obligatory, if the said P. can have the same delivered to him ; and if the said P. cannot have the same delivered, then the aforesaid sum of £100 current money, for the value of the same, and the said £10 current money, for his damages aforesaid, by the jurors aforesaid, in form aforesaid assessed, as also the sum of — to the same P. on his assent adjudged by the court here for his costs and charges by him about his suit in this behalf laid out and expended, and the said D.," &c.

In this case there was an absolute judgment entered for

so much money—six hundred dollars. That was a defect. There are two courses open to the court in correcting this error, viz.: One to send the case back for a new trial, which we are reluctant to do, and the other is to reform the judgment here and enter it according to precedents.

We think the damages are too large in this case, and our suggestion is that if the plaintiff will remit \$100, we will correct the judgment here and make it conform to the precedents; that the plaintiff recover the specific property if it can be recovered by him, and, then, if not, recover the amount of damages. That is the conclusion we have reached in this case.

THOMAS O'DAY *vs.* LOUIS VANSANT.

LAW. No. 22,969.

{ Decided March 8, 1888.

{ The CHIEF JUSTICE and Justices HAGNER and COX sitting.

In ejectment when the plaintiff derives his title through a sale made by a trustee, by reason of default under a deed of trust given to secure the payment of a sum of money, it is not necessary that the plaintiff shall affirmatively establish by parol evidence all the preliminaries showing the authority of the trustee to sell, such as the default, the regular advertisement of the sale of the property, &c. If, after the debt is due, according to the terms of the deed of trust, the trustee conveys in professed execution of the trust and by way of foreclosure, he passes the legal title to the grantee for all the purposes of an ejectment suit. If he has acted in violation of his trust, the remedy against him is in equity.

MOTION for new trial on exceptions.

THE CASE is stated in the opinion.

M. F. MORRIS and FRED. W. JONES for plaintiff.

H. T. TAGGART and R. P. JACKSON for defendant.

Mr. Justice COX delivered the opinion of the court.

This was an ejectment suit relating to part of lot 13, square 37, in the city of Washington. The plaintiff derived his title through a sale made by a trustee by reason of default under a deed of trust given to secure the payment of a sum of money.

At the trial, the ruling of the court was, in substance, that because the plaintiff had failed to prove that the debtor who gave the deed of trust was in default at the time of sale, and also failed to prove affirmatively the regular advertisement of the sale of the property under the deed of trust, therefore the plaintiff was not entitled to recover. In other words, it was held that in an ejectment suit the party claiming under a sale made by authority of a deed of trust, must affirmatively establish by parol evidence at the trial, all the preliminaries showing authority to sell. That was excepted to, and that is the only question brought before us in this record.

We think there was error in that ruling. The due publication of notice of sale and the fact that the debtor is in default are matters *in pais* entirely. There are no methods known of making them matters of record, and after the lapse of a certain time, it would be impossible to prove them by parol. We think that after a debt is due according to the terms of the deed of trust, and the trustee conveys in professed execution of his trust and by way of foreclosure of the deed of trust, he passes the legal title to the grantee for all the purposes of an ejectment suit founded on such title. If he acts in violation of his authority under the trust, it is very easy for the grantor to invoke the aid of a court of chancery to establish his title. But we think it sufficient to show that the trustee conveyed a legal title professedly in execution of his trust. If it were made necessary for the plaintiff in an ejectment suit to establish all these preliminaries which are matters *in pais* it would very seriously affect the security of all titles in trust.

We think the court below erred in that respect, and a new trial is therefore granted.

CLIFTON ANDERSON AND JULIA ANN FOX

vs.

WILLIAM SMITH.

LAW. NO. 26,636.

{ Decided March 5, 1883.

{ The Chief Justice and Justices HAGNER and Cox sitting.

1. In ejectment in this District the general rule is that in making proof of record title the plaintiff must go back to the original source and show a grant either from the State of Maryland or the United States, and then, if there should be a hiatus in the chain of title, twenty years possession in conformity with the deeds will raise a presumption of the missing links. But when both parties claim title from the same source it is not necessary to go beyond that source.
2. When the plaintiff has failed to trace title from the State of Maryland or the United States, and the defendant, instead of resting upon that defect, goes on with his evidence and in the course of it shows that he is claiming from the same source as the plaintiff, the defect in the plaintiff's proof will be cured.
3. The relationship of a deceased party cannot be established by his own declarations, but must be proved *aliunde*; when, however, that relationship is once established, his declarations as to kinship of other parties are admissible.
4. An exception to this rule is allowed only in cases of very ancient pedigree, where it is impossible to find proof of the declarant's relationship otherwise than by his own declarations, but even in that case some degree of evidence is required.
5. A party has a right to designate his own heirs; whether he be mistaken as to the relationship or not concerns no one but himself; declarations of a deceased party upon that subject are therefore properly admissible.
6. Proof that plaintiff's parents, who were slaves, lived together in Virginia as man and wife, without proof of a marriage either according to law or according to any custom prevailing at the time in any State, cannot be received as evidence of the legitimacy of their offspring.
7. The provisions of section 724. Revised Statutes of the District of Columbia, in relation to the cohabitation of colored persons previous to their emancipation, applies only to those who were residents of the District of Columbia.
8. In an action of ejectment plaintiff should show that the defendant was in possession.

THE CASE is stated in the opinion.

J. McDOWELL CARRINGTON and R. B. LEWIS for plaintiff:

These questions were all considered in the case of Jones' Adm'rs, *vs.* Jones et al., 36 Maryland, page 448, and the conclusions then reached sustain the ruling of Judge Mac Arthur in this case. 1 Phillips on Ev., 240; 3 Starkie, 1119, n. (1) as to the fourth and ninth exceptions.

The status of bastardy was as foreign to the condition of slavery as the status of legitimacy. A slave was not a bastard, and therefore he was not incapable of inheriting when emancipated. He had no foul or corrupt blood. Bishop on Marriage and Divorce, vol. I, 16 3-b; *Stikes vs. Sevanson*, 44 Ala., 633; *Jones' Adm'r, vs. Jones et al.*, 36 Md., 448.

The custom as to the marital relation of slaves is one of which the courts do and should take judicial notice.

In this case we have proof of the declaration of James Taylor and Ben Anderson that they were brothers—competent as evidence; and the court below was right in refusing the fourth and ninth prayer

REGINALD FENDALL and E. A. Newman for defendant:

1. Plaintiffs commence chain of title with equity proceedings in 1819. (See 1st exception.) In all actions of ejectment the plaintiff, in order to recover, must show a grant from the Proprietary. *Mitchel vs. Mitchell*, 1 Md., 44; *Cockey's Lessee vs. Smith*, 3 H. & J., 20.

It has been held by the Circuit Court of this District that it is unnecessary to show grant from the State of Maryland as source of title to lots in the city of Washington. *O'Neal's Lessee vs. Brown*, 1 Cr. C. C., 69. In the case of city lots, however, all the title of the State of Maryland and the individual owners was conveyed to the United States in 1791, and from that time, and with the United States as a source, it is necessary to show title in reference to said lots. The individual owners of land in the District outside the city did not convey to the United States, and the only effect of the cession upon them was a change of sovereignty.

Instead of beginning their title with a decree passed thirty years after the cession, the plaintiffs should have shown grants from the Proprietary, or, at least, as is the practice with city lots, commenced their chain of title at the date of the cession, 1791.

2. Declarations as to pedigree admitted without proof *aliunde* of relationship of declarant to family.

"It is well settled that before the declaration as to pedigree can be admitted the relationship of the declarant to the family must be established by other testimony." *Blackburn vs. Crawford*, 3 Wall., 187.

3. Evidence of slaves living on the same plantation as man and wife, without proof of marriage according to custom or law, allowed to go to the jury as conclusive proof of marriage.

There is no marriage unless the parties thereto are able and willing to contract, and actually contract. There is no testimony in the case on the subject of marriage, except that the plaintiff's father and mother, both slaves, lived as man and wife on the same plantation; there is no evidence of consent of the master, nor the performance of any ceremony, nor that they were married in accordance with any custom prevailing at the time.

A slave is not able to make any contract, not even matrimony. 1 Md., 561.

Cohabitation and mutual recognition between slaves as husband and wife do not constitute that relation so as to entitle them to the privileges and disabilities incident to husband and wife at the common law. *State vs. Samuel*, 2 Dev. & Bat. (N. C., Law), 177.

There are two enabling acts of Congress bearing upon the marriage of slaves, neither of which apply to this case.

Section 724, Revised Statutes of the District of Columbia, provides that, "All colored persons in the District who, previous to their actual emancipation, had undertaken and agreed to occupy the relation to each other of husband and wife, and were cohabiting together as such, or in any way recognizing the relation as existing, on the 25th of July, 1866, whether the rites of marriage have been celebrated between them or not, are deemed husband and wife," &c.

Act of February 6, 1879, supplement to Rev. Stats. U. S.

vol. I, p. 409 (passed after the pretended right of plaintiffs accrued), takes effect from its date, and provides that the issue of a marriage of colored persons, contracted and entered into according to any custom prevailing at the time in any of the States wherein the same occurred, shall be deemed legitimate.

There was no evidence offered to show that the said Ben and the said Chloe ever resided in the District of Columbia, or that they occupied the relation to each other of husband and wife, or were cohabiting together as such, or in any way recognized the relation as existing, on the 25th of July, 1866; nor was there any evidence tending to show that the plaintiffs ever resided in the District. On the contrary, the evidence showed that they always resided in the State of Virginia.

No testimony was offered of facts necessary to be established in order to permit the plaintiffs to recover as the children of Ben Anderson under the act of February 6, 1879.

No evidence whatever was offered tending to show that the father and mother of Ben Anderson and James Taylor were ever married or lived together as husband and wife. Such testimony was necessary to the plaintiff's case. *Blackburn vs. Crawford*, 3 Wall., 175.

The plaintiff in ejectment cannot recover unless he prove the defendant to be in possession. *Pope vs. Pendergrast*, 1 A. K. Marsh (Ky.), 122; *Cooley vs. Penfield*, 1 Vermont, 244; *Stevenson vs. Griffith*, 3 Vermont, 448.

If the plaintiff in ejectment claim as collateral heir, he must show the descent of himself and the person last seized from some common ancestor, together with the extinction of all those lines of descent which would claim before him. This is done by proving the marriages, births and deaths necessary to complete his title and the identity of the persons. 2 Greenleaf on Ev., sec. 309; *Tillinghast's Adams' Eject.*, 282-8.

In the absence of proof of an actual marriage, or of facts necessary to constitute a marriage under the acts of Congress

aforesaid between the parents of the plaintiffs, the legitimacy of the plaintiffs is not to be presumed. *Blackburn vs. Crawford*, 3 Wall., 175.

The plaintiffs having failed to prove that James Taylor and Ben Anderson were children of the same parents, or that any marriage in fact ever took place between their parents, the law will not presume a marriage or the legitimacy of the said children, and consequently the plaintiffs could not inherit from James Taylor as his heirs-at-law. *Ibid.*

Mr. Justice Cox delivered the opinion of the court.

These plaintiffs are colored people, who have brought this action of ejectment to recover a small piece of land outside the city, in the county of Washington. They claim to be the nephew and niece of James Taylor, and the children of a colored man named Ben Anderson; both Taylor and Anderson having been formerly slaves in Virginia.

The case has already been twice tried, and we, therefore, have great reluctance in sending it back. But it seems to us that the record discloses errors which were prejudicial to the defendant, and at the same time discloses possibilities of a better case for the plaintiffs.

In order to make out title in the first instance, at the trial, the plaintiffs produced in evidence the decree of this court passed in 1819, for a sale of this property, and a subsequent regular chain of conveyances down to James Taylor, the *propositus*, and rested upon that as proof of title.

The defendant objected that that was not sufficient proof of title; that it was incumbent on the plaintiffs to go back to the original source of title, the State of Maryland or the United States, there being in this case no proof of possession in conformity with the deeds, but simply record title from 1819 to 1871. The court below held that this was sufficient proof of title.

There was, as we think, error in that. But perhaps it may be cured, as we shall see hereafter.

Undoubtedly, the general rule is, that in seeking to make

out proof of record title, the plaintiff must go back to the original source, and show a grant from either the State of Maryland or the United States, and then if there should be a hiatus in the chain of title, twenty years' possession in conformity with the deeds will raise a presumption of the missing links. It is not absolutely necessary, therefore, to show a regular succession of conveyances from the State all the way down. In this case there was no possession shown, but simply the naked proof of record title from 1819 to 1871, and the court erred in ruling that that was sufficient proof.

But there is another rule of law which may obviate the difficulty, and that is, that where both parties claim title from the same source, it is not necessary to go beyond that source. For example, one man claims to be the heir of a decedent, and another claims to be his devisee. In an action by one against the other, it is not necessary to prove the title of the decedent. The only question is, who has derived title from him?

In the next place, the defendant, instead of resting upon the defect in the plaintiffs' proof, went on, himself, to prove that the title of James Taylor, which the plaintiffs claim to have inherited, had been devised by him to Mary A. Smith, wife of the defendant.

So that, the defendant then showed that he relied upon a title derived from the same source as that upon which the plaintiffs depended. As far as the first error is concerned, it must be held to have been cured by the defendant.

Further on, after having shown a record title down to James Taylor, in order to establish the relationship between plaintiffs and James Taylor, they offered in evidence the declarations of Ben Anderson, their father, that he was the brother of James Taylor. The form in which the offer is made, as stated in the bill of exceptions, is this:

That, previous to his father's death, which occurred in 1867, his father told him that he, Ben Anderson, had a brother named James, who, when quite young, was sold in slavery to a man named Taylor, in Virginia, and afterwards

to a man named Allen, and that he (Ben Anderson) had no other brother and no sister.

That does not seem to go very far towards establishing the fact that this James Taylor was the Virginia James Taylor. The only proof is, that he was sold to a man named Taylor ; but whether that brother assumed the name of his master, and became James Taylor, is not pretended to be testified to.

But suppose the brother had been identified, the question then arises, whether the declarations of a deceased party are sufficient to establish his relationship to another deceased party. The declarations are objected to on two grounds : 1st. The *witness* is not proved *aliunde* to be a relation of the family ; and, 2nd. That the deceased, whose declarations are offered in evidence, are not proved *aliunde* to be such.

The rule on that subject is, that you cannot establish the relationship of the declarant himself by his own declarations, but that the relationship must be proved *aliunde* ; and when once that is established, then his declarations as to kinship of other parties are admissible. This was settled in the case of the Banbury Peerage and other cases, in England. In that case a bill in chancery, in the first instance, by one as next friend of an infant, was offered in evidence, wherein the complainant describes himself as the uncle of the infant in question. And the answers of other parties, speaking of their relationship to the infant, were offered, all of them being dead. These were offered in evidence as the declarations of deceased persons, in order to prove the legitimacy of the infant in question. The question was submitted by the House of Lords to all the judges, and they unanimously held that such declarations could not be received in evidence without proving *aliunde* that the uncle and the other so-called relatives were related to the infant.

There is an exception allowed only in cases of very ancient pedigree, where it is impossible to find proof of the declarant's relationship otherwise than by his own declarations. But even in that case, it is said in Phillips on Evidence :

"Still some degree of evidence is required, otherwise a mere stranger, by claiming alliance with a family, might

assume the power of materially altering the rights of its several branches by making statements in his lifetime respecting them." 1 Phillips' Ev. (4 Am. Ed. from 10 Eng.), 275-6.

The same question was settled in the case of the Leigh Peerage and Berkley Peerage cases, in which it was held that the relationship of the declarant must be established *aliunde*.

It seems to us, therefore, that the declarations of Ben Anderson, the father of the plaintiffs, were not admissible to show that he was the brother of James Taylor.

The proof was followed up by the statements of several people, who lived on the adjoining plantation to James Taylor, that they had heard both James Taylor himself and Ben Anderson declare that they were brothers. Those declarations were excepted to. As far as the exception relates to the declarations of Ben Anderson, the same observations might be made as to the declarations referred to in the second exception. The declarations of James Taylor, however, are not open to that objection. There is no reason why they should not be received. He has the right to designate his heirs; whether he be mistaken as to the relationship or not concerns no one but himself. His declarations were properly admitted.

In the fourth exception it appears that the plaintiffs offered evidence tending to show that Ben. Anderson and Chloe Anderson were both slaves and lived on the same plantation as man and wife. And then the plaintiffs rested, without offering any proof tending to show a marriage between the father and mother of Ben Anderson, or that Ben Anderson, the father, and Chloe, the mother of the plaintiffs, were married. In other words, the plaintiffs content themselves with proving that the father and mother lived together as slaves and as man and wife, but offered no proof of marriage, either according to law or according to any custom prevailing at the time in any State. The defendant's counsel prayed the court to instruct the jury that, in the absence of such testimony, they must find for the defendant; which the court refused.

Ordinarily, we know, marriage must be established by proof of marriage rites according to law. There is, however, an act of Congress, approved 6th of February, 1879, which provides, in substance, that the issue of colored persons cohabiting as man and wife, according to the custom prevalent in the state before the emancipation of slaves, shall be deemed legitimate.

But there is no proof in this case of any marriage, nor is there any proof of the custom in that regard.

Section 724, R. S. D. C., provides: that, "all colored persons in the District, who previous to their actual emancipation, had undertaken and agreed to occupy the relation to each other of husband and wife, and were cohabiting together as such, or in any way recognizing the relation as existing, on the 25th day of July, 1866, whether the rites of marriage have been celebrated between them or not, are deemed husband wife, and are entitled to all the rights and privileges, and subject to the duties and obligations of that relation, in like manner as if they had been duly married according to law."

That applies, however, only to those who resided in the District of Columbia and, therefore, it is not urged in this case. But there is a statute of Virginia, on this subject, passed some time in 1866, almost *in totidem verbis* with the statute of the District of Columbia, which applies to former slaves who were cohabiting as man and wife at the date of the statute, and their offspring.

In this case, however, although it is testified that Ben Anderson and Chloe lived as man and wife, it does not appear that they continued to occupy that relation at the time the act of Virginia was passed. There is no evidence on that subject. It would be quite prudent, perhaps, for the plaintiffs, in another trial to offer that Virginia act in evidence.

But, as the case now stands, the proof does not come up to the requirements of the law, as establishing lawful marriage between the the parents of these plaintiffs, and that exception, we think, is well taken. And that is suf-

ficient to dispose of the case, and involve the necessity of a new trial.

Before we leave the case, however, there is one other matter to be adverted to.

The defendant offered a paper purporting to be the will of James Taylor, whereby this real estate was devised to Mary A. Smith; and he has offered evidence, further, to show that she took sole possession of such real estate upon the death of Taylor, by virtue of his will, and has ever since claimed to own the same by virtue thereof.

This suit is brought against the husband (Wm. Smith) of the devisee in that alleged will. It is not proved in the case that he was in possession of, or that he claimed to own the property. This was not, however, formally excepted to by the defendant, and the defendant, on his part, undertook to show that Mary A. Smith, his wife, had this property devised to her, and took possession of it in pursuance of the devise; in this argumentative way, showing that defendant did not claim. I merely suggest this now to show that on another trial the plaintiffs had better prove affirmatively that the defendant was in possession.

For the foregoing reasons, a new trial is granted.

THOMAS BANNAGAN vs. THE DISTRICT OF COLUMBIA.

LAW. No. 20,903.

{ The CHIEF JUSTICE and Justices HAGNER and COX sitting.
{ Decided March 12, 1883.

1. A municipal corporation is not liable for the consequences of a mere error of judgment in the plan or design of its public works; negligence in the choice of its agents or instrumentalities must be shown.
2. If a sewer when first constructed be of adequate capacity but subsequently becomes obstructed, whereby damage ensues, no responsibility therefor attaches to the municipal authority except after notice and neglect to redress the evil.

THE CASE is stated in the opinion.

BIRNEY & BIRNEY and ROBT. J. MURRAY for plaintiff.

RIDDLE & MILLER for defendant.

Mr. Justice COX delivered the opinion of the court.

This is an action brought to recover damages alleged to have been suffered by the plaintiff in his house and adjacent premises, in consequence of the accumulation of water in front of his premises caused by the insufficiency of the drain pipe or sewer provided by the authorities of the District for relieving that difficulty. The declaration sets out "that the plaintiff was and is the owner of lot 5, square 809, fronting on 12th street, between Q and R streets northwest, in Washington, and was and is a dealer in groceries in the building thereon, and prior to the injuries alleged, his business was very profitable by reason of the large number of his customers, and was worth \$600 per annum.

That defendant caused the grade of Q street at its intersection with 12th street to be raised above the level of 12th street and of plaintiff's lot, whereby all water draining upon 12th street above Q street, which, by reason of the said raising of the grade of Q street, could find no outlet, formed large ponds in front of plaintiff's house; whereupon defendant caused a sewer to be laid along the north line of Q street and laid or constructed a certain other pipe, sewer or sewer-trap on the north side of Q street at its intersection with the east side of 12th street and emptying into the sewer first mentioned, which said pipe, etc., was designed

by the defendant for the purpose of draining 12th street in front of plaintiff's property; yet plaintiff says that the defendant * * * negligently and unskilfully constructed or caused to be constructed said pipe, lateral sewer or sewer-trap *of such insufficient size and imperfect construction that the water* on 12th street could not be carried off, and on or about January 15, 1876, and at a great many times since then, the water which collected on 12th street between Q and R streets, 'could not, by reason of the negligent and unskilful construction of the said sewer-trap or lateral sewer, be carried off or drained into the said sewer, but on account of said deficient pipe was forced back and formed into large stagnant and ill-smelling pools or ponds in front of plaintiff's said store, thereby preventing convenient and dry access to the said store for plaintiff's customers,' causing his business to become utterly valueless and unprofitable by means of his diminished sales, and to the great inconvenience of plaintiff in his use, occupation and comfortable enjoyment of his said premises, to his damage, \$1,500."

The defendant pleaded "not guilty," and issue was joined.

The gravamen of the complaint, it will be seen, is, that the pipe was negligently and unskilfully constructed, or caused to be constructed of insufficient size, so that the water which collected could not, by reason thereof, be carried off or drained, and because of this insufficiency of the pipe, was forced back and remained in stagnant pools, &c. We have repeatedly held that a municipal corporation is not liable for the consequences of a mere error of judgment in the plan or design of its public works, but that it is incumbent on the plaintiff, who complains of injury, to show negligence in the choice of its agents or instrumentalities before a liability can be fixed upon the municipality for damages accruing to him. In this case there is a general charge of negligence and unskilful construction of pipe. When we come to look at the evidence, however, it seems to fall short of that level. The testimony of the witnesses is, that a six-inch tile pipe was constructed, but that owing

to the want of covering or protection it failed to carry off the water ; that the pipe would have been much less likely to have become choked or stopped if the mouth had been raised four or five inches above the level of the gutter. In other words, the proof establishes nothing more than an error in the construction of this pipe, but it does not bring home to the defendant any delinquency in respect to care and diligence in the choice of means for remedying the evil complained of. All that is said in this testimony may be true, and yet it may have been a matter of fair difference of opinion whether this pipe was more likely to be choked up with the mouth of it open or with a grating over it. It may have been a matter of experiment, and the proof shows that after the experiment was made, and complaint made to the defendant's engineer, the evil complained of was remedied, and the plaintiff has suffered nothing from it since. It seems, therefore, that the utmost that is established by this proof, if anything, is a mere error of judgment in the selection of the means by which the evil complained of here was redressed, and in that respect the proof fails to come up to the averments of the declaration.

There is another respect in which there seems to be a variance between the proof and the declaration. As we have already seen, the declaration first charges upon the defendant the duty of constructing lateral pipes of sufficient size to carry off the water shed upon the street ; and the averment is that they negligently and unskilfully caused to be laid a pipe of such insufficient size and imperfect construction that the water could not be drained off. Now, to the contrary of all this, the proof shows explicitly that the pipe was of ample size to carry off the water ; that as soon as the obstruction in the pipe was removed the water flowed off freely, and the plaintiff has not since suffered any annoyance.

The rule on this subject is, that if sewers and drains are originally of adequate capacity as at first constructed, and subsequently become obstructed, there is no responsibility therefor devolved upon the municipal authorities except

after notice and neglect to redress the evil. In this case there is a general allegation that after frequent complaints to the defendant the evil was removed. But it is not proved clearly that any unreasonable delay took place in doing this, or that any injury was suffered by the plaintiff in consequence of such delay. But even if it had appeared in the proof, it is not the case made in the declaration. The real cause of the trouble in this case seems to have been an omission to provide some means of preventing the pipe from choking up. Now, if that is alleged in the declaration at all, it is in the general allegation of unskilfulness and negligence in the construction of the pipe. But, as we have already shown, the evidence on this subject proves nothing in the world but an error of judgment, and does not bring home to the defendant any negligence in anticipating and providing for this evil. If it is not embraced within this general averment of negligence in the construction, then the evil complained of does not appear in the declaration at all, and we think the court below were right in holding that upon the proof a case was not made out such as was averred by the plaintiff. That was the statement in the instructions of the court below to which exception was taken.

The ruling of the court below, therefore, is affirmed.

THE UNITED STATES
vs.
THE NATIONAL BANK OF THE REPUBLIC

I.A.W. No. 13,706.

{ Decided March 13, 1883.

{ The CHIEF JUSTICE and Justices HAGNER and COX sitting.

B., an officer of the army, having a claim against the United States for pay and allowances, gave T. & Co. a power of attorney to collect the same. The power of attorney did not authorize T. & Co. to endorse any check that might be issued in settlement thereof. On the 16th of January, 1866, L., United States Paymaster, issued his check in payment of the claim on the defendant bank, which was one of the designated depositaries of the United States, in the city of Washington. The check was drawn payable to the order of B., and was mailed by L. to T. & Co. One of the firm forged an endorsement on the check in B.'s name, and had it cashed by R. & Co.; R. & Co. then sent it to the Bank of A., in the city of New York, who presented it to the defendant bank, when it was thereupon paid. B., not receiving the money or hearing from his claim, collected it from another paymaster. Three years afterwards (January 15, 1869), the forgery of the endorsement was discovered, whereupon L., within six days afterwards, notified the defendant bank, and advised it to seek recourse against the Bank of A., and within nine days more furnished it with such proofs of the forgery as were possessed by the Government. In February, 1873, the United States brought suit against the defendant bank to recover the money paid on the check. The defenses were, that L., and not the United States, should have brought the suit; and laches, in failure to give timely notice, whereby the defendant had lost its recourse against the prior endorers.

Held, 1st. That the suit was properly brought by the United States. 2nd. That the payment of a forged check gives no right of action on the paper itself, against any party to it; as in the case of a bill or note or check which had been dishonored, the party paying can only sue the party paid for money had and received, leaving it to the latter to sue in the same manner his immediate predecessor in the transaction; and, as the defendant bank had not been deprived of its recourse against the only party it could have sued, viz., the Bank of A., there being still three years left, under the statute of limitations of New York after it received notice of the forgery, in which it could have brought suit, no such laches had been shown on the part of the United States as would disentitle it to recover.

THE CASE is stated in the opinion.

GEO. B. CORKHILL and RANDOLPH COYLE for the United States.

R. K. ELLIOT for defendant.

Mr. Justice COX delivered the opinion of the court.

J. A. LAWYER was a paymaster in the United States Army, and in January, 1866, had a large amount to his credit as

such paymaster in the National Bank of the Republic, the defendant in this action, which is, and then was, a national bank and a duly designated depository of the public moneys of the United States.

Captain Edwin R. Brink, formerly in the army, had a claim against the government for pay and allowances, which he employed Rutger Teal & Co. to collect, giving them a power of attorney for that purpose and also a printed voucher signed and receipted in blank, to be filled up with the amount that might be ascertained to be due to him. As Brink testifies, and we may assume, the power of attorney did not authorize Teal & Co. to indorse any check that might be issued to Brink in the settlement of his claim.

On the 16th of January, 1866, at Washington, the paymaster, Lawyer, in settlement of Brink's claim, issued his check on the defendant, payable to the order of Brink, for \$966.37, and sent it by mail to G. W. Scott, said to have been a clerk in the office of Teal & Co.

The check was indorsed in Brink's name, presumably by Rutger Teal, to the order of Riggs & Co., and cashed by the latter.

Riggs & Co. then indorsed it to the order of the Bank of America of New York. On the 18th of January it was paid in New York by the Central National Bank of New York and charged to the defendant, and on the 19th it was paid by the defendant and charged to the account of Lawyer. This account was subsequently settled, and this, with his other checks, was returned to Lawyer and remained in his possession until January 13, 1869.

In the settlement of Lawyer's accounts with the United States, Brink's receipt, which he had received from Rutger Teal was, of course, filed as one of his vouchers.

Brink, in the meanwhile, having heard nothing of the collection of his claim, had received pay from another paymaster.

The voucher filed by Lawyer made it appear that he had been paid twice. He was therefore called upon to refund. At the request of the second auditor, Lawyer, on the 13th

of January, 1869, forwarded the check in question to him, and it was submitted to Brink's inspection, whereupon he pronounced it a forgery, and made an affidavit to that effect on the 15th of the same month.

Lawyer must have been notified of that fact, and perhaps called upon to pay the amount—though no evidence is given directly on that point—for on the 21st of January he wrote to the president of the defendant bank, notifying him of the fact that the check had been paid on a forged indorsement; that he would have to look to the bank for reimbursement, and requesting him to correspond with the Bank of America on the subject and demand reimbursement.

Mr. Coyle, the president, in reply, wrote on the 23d of January, requesting Lawyer to forward the check and accompany it with his own affidavit, together with that of Brink, that the latter's indorsement was a forgery.

On the 27th of January, Lawyer wrote to Coyle, enclosing his own affidavit, as requested, and stating that the check "is now in Washington, and I will request the party in whose hands it is to deliver it to you."

On the 30th of January, Henry C. Harmon, Deputy Second Auditor of the Treasury Department, according to his testimony, delivered the check and the affidavit of Brink as to the forgery, which had been made on the 15th, as before stated, to one of defendant's officers.

This suit was brought in February, 1875, but the case was not tried until June 5, 1882.

At the trial, the court held that the United States had lost its recourse against the bank by laches. The learned judge says: "A case where the difficulty was not discovered until the lapse of three years, and then only incidentally, and where it appears that five years or more after that were allowed to elapse before any definite action was taken, shows laches on the part of the government, notwithstanding they had twelve or fifteen years before been engaged in a great war."

And again: "It strikes me that under all the circumstances the government has been guilty of laches in not commencing this proceeding earlier."

And again : " Year after year passes ; the check becomes outlawed, as far as Riggs & Co. are concerned."

And again : " It is evident that the power of indemnifying itself against prior parties to this check is lost."

I have cited these passages from a somewhat lengthy charge, in order to indicate the theory upon which the court instructed the jury to find for the defendant. It seemed to be partly that the laches consisted in not discovering the forgery for three years after it occurred, and partly in not bringing suit earlier.

At the same time, the court stated that " the bank, within a reasonable time, was certainly notified of the fact, and furnished with some proof that the payee had never endorsed the note, and that he had never authorized anyone to endorse it ;" and again, " to be sure this notice to the bank, accompanied with an affidavit that the endorsement of the check had been forged, was sufficient to put them upon inquiry, and perhaps to enable them to pursue Riggs & Co. and the bank from which they received it."

The argument for the defense in this court, however, has proceeded upon a different ground from that taken by the court below, and one directly opposed to it, viz., that the laches consisted in not giving timely notice to the bank so as to enable it to have recourse to antecedent parties dealing with it in reference to this check.

Before examining these questions, it may be well to notice another, which may be called preliminary, and that is, whether this suit can be maintained by the United States, or ought to have been brought, and could only be maintained, by the paymaster, Lawyer.

The affirmative was held by the court below ; the opposite has been maintained here in argument.

It is true, that the dealings of the bank were with Lawyer only. But he was an agent of the United States. He deposited Government funds with the defendant. These deposits were, in a legal sense, loans of Government money to the bank and created a debt of the bank to Lawyer, in his character of agent of the United States.

On the general principles of the law of agency, there can be no more doubt of a principal's right to sue for and recover money of his, loaned by his agent, than of his right to sue for the price of his goods sold by his agent. Of course, that right may be modified by equities between the agent and the third person, where he has dealt as a principal and was supposed to be such, by the stranger, but no such question arises here.

Independently of these general principles, the express legislation of the United States brings the bank into direct privity with the Government. It was a national bank and a duly designated depository of the public moneys. As such, it was bound to receive public moneys issued to paymasters and other officers, and to perform all such reasonable duties in that character as might be required of them. Sec. 5753, Rev. Stats. They became as much the agents of the Government as the paymasters themselves. Indeed, after a thorough review of the legislation on this subject, Judge Blatchford, in the case of *Morgan vs. Vandyck*, 7 Blatch., 147, came to the conclusion, with much show of reason, that the United States *only* could sue a bank which was a designated depository of public moneys for a balance due, and that the action could not be maintained by a paymaster who had deposited the funds.

However this may be, we consider the *right* of the government to sue, if it so elect, to be sufficiently clear.

What, then, is the relation of the United States to the defendant with reference to this check?

The defendant paid this check for account of the United States, and upon exhibiting it as a voucher, in settlement of its accounts with the Government, in the person of its agent, the paymaster received credit for it. This is precisely the same thing as if the United States had paid back the money to the bank; and if the credit was given under a mistake of facts, there is the same right of action for money had and received that would exist if the money had actually been reimbursed to the bank by the United States. Such was the view taken by the Supreme Court in the case of the Bank

of the United States *vs.* The Bank of Georgia, 10 Wheaton, 333, where it appeared that in a case of mutual accounts, forged bills of the defendant had been passed to the credit of the plaintiff in account. The court said :

" We are of opinion that it is a case of actual payment. We treat it in this respect exactly as the parties have treated it, that is, as a case where the notes have been paid and credited as cash. The notes have not been credited as notes or as a special deposit ; but the transaction is precisely the same as if the money had first been paid to the plaintiffs, and instantaneously the same money had been deposited by them. * * *

" Considering, then, the credit in this case as a payment of the notes, the question arises whether, after a payment, the defendants would be permitted to recover the money back ; if they would not, then they have no right to retain the money, and the plaintiffs are entitled to a recovery in the present suit."

Virtually, then, the United States have refunded to the bank money which the bank had paid for the United States on a forged endorsement, and the main question is whether the United States may recover the money as paid under a mistake of fact.

The only objection alleged is laches. We can hardly suppose that the omission to discover the forgery for three years after it was committed can be pronounced by the court as laches in law.

In the case of *Don et al. vs. Postmaster-General*, 1 Pet., 918, it appeared that after a postmaster had been removed from office, the Postmaster-General, *in direct violation of law*, had omitted even *to open an account with him*, or to make any claim on him for five years, and yet, although it was alleged that he was solvent when discharged, and became insolvent before suit brought, these facts were held no defense to his sureties, on the ground that the laches of its officers cannot be imputed to the Government.

Several previous decisions were cited in cases of admitted neglect on the part of officers, in delaying to call to ac-

count delinquent financial agents of the Government to the prejudice of their sureties, in all which the Government was sustained.

A still harder case was that of *Smith vs. The United States*, 5 Pet., 294, in which it appeared that after the removal of a paymaster from office no notice was given to him to account for nine years, and in the meantime he had become insolvent and the sureties had lost the means of indemnifying themselves. Yet they were not held discharged.

In the present case there seem to be no facts in proof showing that the delay was the fault of the officers of the United States, instead of being the natural consequence of the then condition of affairs.

Assuming that in 1869 the United States had a cause of action against the defendant, the mere delay to bring suit cannot be alleged as laches. The statute of limitations is no defence against the United States, and their mere omission to sue the defendant is equally unavailable as such, as the Supreme Court has held in a number of cases which it is unnecessary to review.

But in this case the reliance is placed upon the principles of commercial law which, it is claimed, impose upon the Government special duties in a case like this.

When a forged paper is accepted and paid by a bank it is said that immediate notice, upon discovery of the forgery, must be given to the party receiving payment in order to entitle to recovery and the same rule is said to be applicable to the United States in a case like the present.

There are several classes of cases in which this question may arise. If a bank accepts and pays a check of its customer, whose name turns out to be forged, it has no remedy against the innocent holder of the check, because it is bound to know its customer's signature. And generally, when a drawee accepts a bill he admits the signature of the drawer and cannot afterwards dispute it against a *bona fide* holder.

There are cases in which the mere receipt of paper without objection will be treated as acceptance, and to repel that presumption, prompt notice is necessary. And this will be

found to be the character of cases in which the strictest rules as to notice have been asserted. *Cooke et al. vs. United States*, 91 U. S., 889. And here the strictness approaches that required as to endorsers or drawers of negotiable paper.

But another class of cases is where the paper of strangers, whose signature a banker is not bound to know, is discounted, purchased or cashed. And to the same class belongs the case where a banker's own customer's check has the payee's endorsement which the banker is not bound to recognize, forged, and the banker pays to one claiming under this forged endorsement. There is a right to recover in such case, but the law does exact diligence in giving notice after the discovery of the forgery, and one of the objects of prompt notice is recognized to be, to enable the party called upon to refund to have recourse against the person from whom he received the forged instrument.

But there is no fixed rule in such a case, like that which prevails as to notice of dishonor of negotiable paper.

All that the law requires is a reasonably prompt notice under the circumstances of each case, and undoubtedly the situation of the parties with reference to remedies over against antecedent parties, is a proper element to enter into the estimate of the reasonableness of notice.

In the case of the *United States vs. Union National Bank* of New York, decided in the District Court for the Southern District of New York, by Judge Choate, and affirmed in the Circuit Court by Judge Blatchford, it appeared that a draft by a United States paymaster on the United States Assistant Treasurer at New York, in favor of one Lewis, was received by Rutger Teal; that Lewis' name was forged by Teal in the endorsement of the draft and finally it was taken by the defendant and paid to defendant by the assistant treasurer. The United States were notified in 1867, that the endorsement of Lewis was forged, but did not notify the defendant of it for about two years, and then, after examination, the deputy assistant treasurer conceded it was genuine. Nevertheless, in 1877, eight years after, suit was brought

against the bank. Meanwhile, Polhamius & Jackson, from whom the bank had received it, became insolvent and the bank lost its recourse against them.

Under these circumstances, it seems very properly to have been held that the delay to give notice was fatal to the right of recovery.

It may be well to compare the present case with that.

The fact of forgery was not known to the Government until January 15, 1869, when the check was submitted to Brink in Washington. Within six days it was communicated to Lawyer, who resided in New York, and his letter was addressed to the bank notifying it of the fact and of its responsibility for a return of the money. In response to a request of the president, made by letter of the 23d, Lawyer's affidavit was forwarded on the 27th, and on the 30th Brink's affidavit and the forged endorsement were delivered to the bank. So that, within six days after discovery of the forgery, the bank was notified of it, and advised to seek recourse against the New York bank, and within nine days more was furnished with all the proof the Government could supply.

It was said that the United States never gave notice or made demand. But Lawyer, if he could claim payment from the bank, could only claim it as agent of the United States, and notice from him, as such, the United States could surely avail themselves of. We think with the court below that this was virtually a notice and demand by the United States.

The notice seems reasonably prompt unless there were peculiar circumstances in the case that made it otherwise.

It is shown that the statute of limitations of New York does not bar an action such as the defendant might have brought, to recover this money from the New York bank, for six years. It had, then, three years left within which to sue the New York bank from which it received the check, and that bank is not shown to have been insolvent. So far, then, it seems clear that the delay of six days did not deprive the defendant of its recourse against antecedent parties.

It is said, however, that it had lost its recourse against Riggs & Co.

Riggs & Co. are supposed to have cashed the check on January 16, 1866, and the defendant paid it on the 19th. With reference to either date the statutory period of limitation would have expired before January 21st, 1869, when the defendant received notice of the forgery. The delay, then, it is said, deprived them of recourse against Riggs & Co., an antecedent party on the paper.

But this position rests upon the, at least, doubtful, if not plainly erroneous assumption that the defendant ever had any recourse against Riggs & Co.

Had this been a draft on the United States, endorsed by Riggs & Co., and taken by the defendant as endorsee, and afterwards dishonored, the defendant, by the law-merchant, would have had recourse against all the antecedent parties. But the defendant was not the holder of the paper as endorsee. The defendant was the drawee of the check, and accepted, paid and cancelled it. Prior endorsers are only liable upon a note, bill or check to a holder when it is dishonored. When the note or bill is paid, the maker or acceptor who has paid it by mistake, *i. e.*, to a wrong person, or on a forged endorsement, has no right of action *on the paper itself*, against any party to it. His right is to sue in assumpsit for money had and received, to recover his money, as paid under mistake of fact. And, of course, such an action can only be maintained by him against the party to whom he paid the money, leaving it to the latter, in turn, to sue his immediate predecessor in the transaction. The defendant, therefore, never could sue any other party than the New York bank from which it received the check.

This view was recognized in the case of the Bank of Commerce *vs.* Union Bank, 3 Comst., 230. That was an action by the drawees of a bill which had been altered and raised after it left the drawer's hands, to recover the amount which the drawees had paid. The court said: "This action is not founded *on the bill*, as an instrument containing the contract on which the suit is brought. The acceptor can never have

~~recourse~~ on the bill against the endorsers. But the plaintiff's right of recovery rests on equitable grounds. In the *Canal Bank vs. Bank of Albany*, the principle was recognized that money paid by one party to another, through mutual mistake of facts, in respect to which both are equally bound to inquire, may be recovered back," &c. This relation of the drawer to the other parties is also recognized in a general way in the case cited.

It does not seem, then, that in consequence of the brief delay in giving the defendant notice of the forgery, any recourse against other parties was lost. We are, therefore, unable to concur with the judge who tried the case below, that a case of laches against the United States is made out sufficient to defeat the action.

Objection was made to the form of the exception taken on the part of the United States, as insufficient to bring the case properly before the court. Without examining this question in detail, we are of opinion that the exception is sufficiently explicit and formal to bring the merits of the case before us.

A new trial is granted.

UNITED STATES, EX REL. J. J. KEY,

vs.

T. F. FRELINGHUYSEN, SECRETARY OF STATE.

{ Decided March 19, 1883.

{ The CHIEF JUSTICE and Justices MAC ARTHUR and COX sitting.

1. In pursuance of conventions between Mexico and the United States, for the adjustment of certain claims, concluded July 4, 1868, and April 29, 1876, a commission was established which awarded a sum of money to W. Subsequently June 18, 1878, Congress, by its act of that date, directed the Secretary of State to receive from Mexico, and distribute to the various claimants the amounts awarded them, except that in the case of W. the President of the United States was requested by the 5th section of the act to investigate any charges of fraud presented by Mexico as to said case "and if he shall be of opinion that the honor of the United States, the principles of public law, or consideration of justice and equity " require that said case should be

opened and retried, it shall be lawful for him to withhold payment of said award, &c. An investigation of the charges was accordingly made and a decision in favor of W. arrived at, whereupon certain instalments of the award were paid to him. This was during the term of President Hayes. Afterwards, and during the term of his successor, the question arose whether the power conferred by Congress to investigate, &c., was exhausted by President Hayes' exercise of it or on the contrary, was a continuing or recurring power which might be exercised by any succeeding President, who, if he should be of a different opinion from his predecessor, would be authorized to withhold payment of the instalments yet undistributed.

Held, That the request was obviously addressed to the existing President, and when he made the investigation and announced the result, this request was satisfied. That it could not be considered a continuing and reiterated request to each succeeding President to re-examine the subject, and consequently the power to withhold the payment of the award which was to result from that examination must be deemed equally limited.

2. Where money due citizens of the United States has been paid, under a treaty, by a foreign government to the United States, but there is no provision as to the manner in which the money is to be distributed among the claimants, and Congress subsequently enacts a law to that end, it is within the power of Congress to repeal such law, and to provide a different mode of distribution, or even to leave the claimants just as they were before the passage of the act; and this it may do either by directly repealing such law or by the ratification of a treaty inconsistent therewith.
3. The President has no power to make treaties except by and with the advice and consent of the Senate, and with the concurrence of two-thirds of its members present. A treaty, therefore, which has not been thus ratified, is wholly inoperative to affect antecedent laws or the rights acquired under them.
4. When Congress is in session, and a law or treaty calculated to repeal an existing law is pending before it, this court, it seems, might, under such circumstances, await the final action of that body upon such law or treaty, before granting or refusing a writ of mandamus prayed for against one of the co-ordinate branches of the government to compel it to carry into effect the existing law. But it will be otherwise when such law or treaty has been pending during two sessions and Congress has adjourned without acting upon it.

THE CASE is stated in the opinion.

S. W. JOHNSTON, R. B. WARDEN and JOHN GOODE for relator.

S. F. PHILLIPS for respondent.

Mr. Justice Cox delivered the opinion of the court.

To state this case in full would require me to read the voluminous petition of the relator, and the equally voluminous return of the Secretary of State, which I think it is not necessary to do. It is sufficient to say, in general terms, that the relator in his petition sets forth the fact that cer-

tain conventions were concluded between the United States and Mexico, providing for the determination of claims of citizens of each republic against the other ; that in pursuance of that convention, a board of commissioners assembled in Washington to adjudicate these claims, and in the course of their proceedings made an award in favor of Benjamin Weil for a large sum of money, the petitioner being an assignee of Benjamin Weil for a small portion of that award. He sets forth, further, that the act of June 7, 1878, required the money paid by Mexico on these claims to be deposited in the hands of the Secretary of State, and made it his duty to pay it out to the parties named in those awards, or their assignees ; and that the Secretary, in pursuance of that act of Congress, had paid out all the installments that had been received from Mexico, except one, then in his hands, which he declined to pay, and he asks the mandamus of this court to require him to disburse the money. After argument on the face of the petition, as upon demurrer to it, the court issued an alternative mandamus, and to that the Secretary has made a return. That return was demurred to, and that demurrer was argued before us at the close of last week. The ground taken by the Secretary will be manifested as I proceed.

The first section of the act of Congress of June 18, 1878, provides :

“ That the Secretary of State be, and he is hereby, authorized and required to receive any and all money which may be paid by the Mexican Republic under and in pursuance of the conventions between the United States and the Mexican Republic for the adjustment of claims, concluded July 4, 1868, and April 29, 1876 ; and whenever, and as often as any installments shall have been paid by the Mexican Republic, on account of said awards, to distribute the moneys so received in rateable proportions among the corporations, companies or private individuals respectively, in whose favor awards have been made by said commissioners, or by the umpires, or to their legal representatives or assigns.”

If the act had stopped here, there would be a plain minis-

terial duty created by it for the benefit of the parties in whose favor the awards were made, admitting of no exercise of discretion and proper to be enforced by mandamus if its performance was refused.

But the language in question is followed by the terms, "except as in this act otherwise limited and provided." And we are referred to the 5th section for the exceptions or limitations to the duty enjoined in the first.

This enacts, "that the President of the United States be, and he is hereby, requested to investigate any charges of fraud presented by the Mexican government as to the cases hereinafter named, and if he shall be of opinion that the honor of the United States, the principles of public law, or considerations of justice and equity, require that the awards in the cases of Benjamin Weil and La Abra Silver Mining Company, or either of them, should be opened and the cases retried, it shall be lawful for him to withhold payment of said awards, or either of them, until such cases shall be retried and decided in such manner as the governments of the United States and Mexico may agree, or until Congress shall otherwise direct."

It is obvious that the power to withhold the payment of the awards is given on a condition, to wit, *if the President shall be of opinion* that the honor of the United States, the principles of public law or considerations of justice and equity require that the *awards* shall be *opened and retried*. If the President should not be of that opinion, no power is given to withhold payment, but the cases lie outside of the exception and fall within the general injunction of the first section.

The case further shows that President Hayes, through Mr. Evarts, Secretary of State, did investigate the charges of fraud presented by the Mexican government, as to the cases above named, in compliance with the act of Congress, and on the 15th of April, 1880, communicated to Congress, as the result of that investigation, the opinion of Mr. Evarts, in which the latter says :

"I conclude, therefore, that neither the principles of public law nor considerations of justice or equity require or

permit, as between the United States and Mexico, that the awards in these cases should be opened and the cases retried before a new international tribunal, or under any new convention or negotiation respecting the same between the United States and Mexico."

We take it for granted that in transmitting this opinion to Congress as the action of the executive, taken in pursuance of the act of Congress, the President is to be considered as adopting this opinion of the Secretary and communicating it as his own.

In addition to the above, he does, indeed, say that the honor of the United States, in his opinion, requires that these cases be investigated *by the United States*. But this was not provided for by the act of June 18, 1878, nor was such an opinion made a condition of the power, or declared to be the ground of any authority to withhold the awards. The condition expressed was the opinion of the President that the *awards, i. e.*, the judgments, as between the United States and Mexico, should be *opened* and the *cases, i. e.*, as international cases, be retried, *i. e.*, tried again, tried as before by an international tribunal. This is further manifest from the fact that payment was to be withheld until the cases should be retried and decided in such manner as the United States and Mexico might agree, or until Congress should otherwise direct. In other words, if the President should think the cases ought to be *retried*, the awards were to be withheld for another international trial, not a Congressional investigation, or until Congress should direct otherwise, *i. e.*, that they should not be so withheld.

It must be apparent, then, that so far the condition had not happened which, under the 5th section of the act of June 15, 1878, would warrant the Secretary of State in withholding payment of the awards, and in the absence of any subsequent legislation, modifying that act, "it would," in the language of Mr. Evarts, "appear to be the duty of the executive to accept these awards as no longer open to reconsideration, and proceed with payment of the same *pro rata* with all other awards under the convention."

But the question is made whether the power conferred by the 5th section of the act of June, 1878, was exhausted by President Hayes' exercise of it, or, on the contrary, was a continuing or recurring power which may be exercised by any succeeding President, *i. e.*, whether any such President may re-investigate the subject, and if he should be of a different opinion from President Hayes, may withhold payment of the instalments yet undistributed.

It will be remembered that the grant of this power is prefaced by a request to the President to investigate the charges of fraud. If he (who is thus requested) shall be of opinion, &c., &c., it shall be lawful for him to withhold payment, &c.

The duty devolved and the power conferred refer to the same person.

The request was obviously addressed to the existing President, and when he made the investigation and announced the result, this request was satisfied. It cannot be considered a continuing and reiterated request to each succeeding President to re-examine the subject, and consequently the power to withhold the payment of the awards which was to result from that examination must be deemed equally limited.

These considerations furnish an answer to one of the positions taken in the return of the Secretary.

The principal and most important ground assigned by the Secretary for withholding payment, is the fact that the President has negotiated a treaty with Mexico for the opening of the awards, which is now pending before the Senate for ratification, having been submitted to that body, it is said, during the first session of the Congress just expired.

In answer to this, it is denied by the claimant that the United States has any power, by a new treaty, to disturb the awards in question. It is argued that they confer vested rights on the claimant which he cannot be constitutionally deprived of either by a law or a treaty.

We do not deem it necessary to express any opinion on this question, because it is not involved in the issue before us. That issue is, whether a ministerial duty is devolved by law on the Secretary of State, to pay this money, which we

are to enforce by mandamus. Neither the claims convention, under which the awards were made, nor the awards themselves, imposed any such duty or contained any provision as to the person by whom, or the manner in which, the money awarded should be disbursed. Legislation was necessary for that object, and that legislation is found in the act of June, 1878. Congress might have enacted a different law. It can undoubtedly repeal that law and enact a different mode of distribution, or leave the claimants just where they were before the act was passed. And if that had been done, the Secretary of State would be relieved of the duty of distribution, and we could not charge him with it. But this would not affect the question whether the awards themselves could be set aside by a new convention. And whether that could be lawfully done or not, yet if such a treaty should be made, it would be a law, at least so far as it would admittedly be within the constitutional power of the Government. It would at least be valid so far as to repeal the act of June, 1878, providing for a distribution of this money. If the United States could do this much by an act of Congress, it could equally do it by a treaty inconsistent with the existing law, for such a treaty has the force of law under the Constitution. But whether the citizen could still insist on the award as his property, and call on Congress to pay him in some other way, is an entirely different question, and one which we are not called on to decide.

The question remains, what effect has this pending treaty on the rights of the claimant under the act of 1878?

By the Constitution it is declared, that all treaties made under the authority of the United States shall be the supreme law of the land.

But a treaty only becomes the law of the land when it is made and completed. The President has no power to make treaties except by and with the advice and consent of the Senate, and with the concurrence of two-thirds of its members present. Until those conditions concur, a treaty negotiated is no more the law of the land than a bill introduced into one of the Houses of Congress, but not yet acted

on by either. Not being yet law, it is wholly inoperative to affect antecedent laws or the rights acquired under them. It furnishes no more excuse for disobedience to an existing law than would the pendency in Congress of a bill to repeal it. It is manifest, therefore, that the pendency of this treaty is no legal bar to the claimant's assertion of his rights under the act of 1878.

We have been embarrassed in this case by the appeal to the courtesy of the court, which, it is said, is due to a co-ordinate branch of the Government. It is said that the issuing of a mandamus is within the discretion of the court. And it is said that if Congress had been in session when this application was made, and a bill were pending to repeal the existing law, the court would hardly interpose by its mandamus; and that the same should be the case where a treaty is before the Senate. If Congress were in session at this time, and any such law or treaty were pending before it, we should hesitate a long time before anticipating its action, and perhaps feel absolutely constrained to await the final action of Congress or the Senate, as the case might be. But this treaty was submitted during the first session of the Congress which has just expired; it has been before the Senate two sessions of that Congress, and has not yet been ratified. It cannot even be considered again for a period of nine months; that is, until another session of Congress. We are told that to the Almighty a thousand years are a one day, and one day as a thousand years; and something similar to that may be said of governments. To the Government, years and days are about alike; it loses nothing by delay. But that cannot be said of the private citizen. Delay to him is often ruinous, and to withhold his remedies for one or two years is to deny him justice, and to do so out of courtesy to a co-ordinate branch of the Government is to make that an excuse for positive injustice. We think, under the circumstances of this case, we are no longer at liberty to withhold the writ applied for, and that the writ of mandamus must issue.

H. CLAY STEWART vs. EDWARD G. ELLIOTT.

LAW. No. 23,306.

In the Matter of the Issues from the Probate Court under the Will of Jared L. Elliott.

{ Decided March 13, 1883.

{ The CHIEF JUSTICE and Justices HAGNER and COX sitting.

1. An appeal lies to the General Term from the rulings of the court in special term during the trial of issues from the Orphans' Court, involving the execution of a will and the competency of the testator. Affirming *Coughlin vs. Poulson*, 2 Mac A., 208.
2. Where an appeal is taken from the action of the court below overruling a motion for a new trial, on the ground of the insufficiency of the evidence, or because the damages are excessive, the statute (secs. 805-6 R. S. D. C.) requires the settling of "a case" containing all the testimony, and such a case is presented when the record contains the certificate of the trial justice that it embodies all the evidence produced on both sides at the trial. Affirming the decision upon this point in *Dant vs. District of Columbia*, 3 Mac A., 273.
3. The exceptions to the rulings of the court need not be made the subject of separate bills but may be embodied in the "case" certified by the trial justice.
4. The rule of the common law that the granting or refusal of a motion for a new trial is a matter resting in the discretion of the justice trying the case and cannot be the ground of a writ of error on appeal, has been affected by the Revised Statutes of the District only so far as to give the right of appeal in three cases, viz., where the motion has been urged upon *exceptions*, or for *insufficient evidence*, or for *excessive damages*. The General Term, has, therefore, no power to interfere with a verdict on the ground that it was contrary to the evidence, or against the weight of the evidence, or because it is inconsistent or uncertain.
5. It is the *legal sufficiency* of the evidence which the statute refers to when giving an appeal upon the ground of "insufficient evidence," and evidence is legally sufficient where it is of such a character and volume that it may well satisfy a reasonable mind of the truth of the position it is introduced to maintain. In which case it must be submitted to the jury, who are the exclusive judges of its sufficiency *in fact*, and their finding cannot be interfered with by the General Term.
6. The degree of mental capacity, which must be possessed by the testator in order to make his will valid, is no more nor less than that which is requisite in the case of a deed or contract.
7. Undue influence and importunity sufficient to invalidate a will may be exercised without the existence of fraud.

THE CASE is stated in the opinion.

COOK & COLE for caveator.

J. J. JOHNSON and WM. F. MATTINGLY for caveatee.

Mr. Justice HAGNER delivered the opinion of the court.

Henry Clay Stewart, as the sole executor, and residuary legatee, propounded for probate in the Orphan's Court of

this District, an instrument of writing which he claimed was the last will and testament of Rev. Jared L. Elliott. Edmund G. Elliott, the next of kin and nephew of the deceased interposed a caveat to the probate of the instrument so propounded, and the court passed an order directing the five following issues to be tried by a jury in the circuit court :

“First. Whether the said paper writing purporting to be the last will and testament of the said Jared L. Elliott, bearing date on the 15th day of April, 1881, was executed and attested in due form of law.

“Second. Whether the contents of said paper writing were read to or by the said Jared L. Elliott at or before the alleged execution thereof by him.

“Third. Whether the said Jared L. Elliott, at the time of the alleged execution of said paper writing, was of sound and disposing mind, and capable of executing a valid deed or contract.

“Fourth. Whether the said paper writing was executed by the said Jared L. Elliott, under the influence of suggestions, importunities and undue persuasion of the said Henry Clay Stewart, or any other person or persons, when his mind, from its disordered, diseased and enfeebled state, was unable to resist the same.

“Fifth. Whether the execution of said paper writing was procured by the fraud, misrepresentations or undue influence or persuasion of the said Henry Clay Stewart, or any other person or persons, acting of their own volition or under the direction of the said Henry Clay Stewart.”

The case was there elaborately tried ; the court granted the instructions presented on behalf of the caveatee, Stewart, and six of those presented by the caveator, which were severally excepted to by Stewart at the time, and delivered its charge to the jury, which rendered its verdict as follows :

Upon the first issue, *yes*.

Upon the second, third and fourth issues, *no*.

Upon the fifth issue, *yes, except as to fraud*.

The caveatee thereupon made a motion which was entered upon the minutes of the trial justice "to set aside said verdict and grant a new trial upon exceptions and for insufficient evidence."

The reasons assigned in support of the motion were as follows :

" *First*. That the evidence adduced in said trial was insufficient for said verdict.

" *Second*. Because said verdict was contrary to law.

" *Third*. Because it was contrary to the instructions of the court.

" *Fourth*. Because it is contrary to the evidence.

" *Fifth*. Because it is against the weight of the evidence.

" *Sixth*. Because it is inconsistent.

" *Seventh*. Because it is uncertain.

" *Eighth*. And also upon exceptions taken by said Stewart, severally, to the rulings of the court during the progress of the trial, and to each of the prayers granted to the said caveator."

The justice overruled the motion, and from his decision the caveatee appealed to the General Term.

In this court several questions of practice have been very fully argued, touching the regularity of the appeal, and the extent of our authority in examining the case. These points involve the proper construction of the act of Congress of March 3, 1863, which one would naturally suppose had been definitely settled during the intervening twenty years since its enactment. But we have concluded, in view of the alleged uncertainties as to the questions, to examine them anew and express our opinion with respect to them in unequivocal terms.

1st. It is contended that no appeal lies to the General Term from rulings of the trial justice during *the trial of issues from the Orphans' Court* involving the execution of a will and the competency, &c., of the testator.

It is true the trial of such issues is an exceptional proceeding, allowed only by a statute which authorizes no appeal, but seems rather to forbid it, from the terms in which it

requires the verdict to be certified to the Orphans' Court for its guidance. It is also true that no appeal was allowed in such cases in Maryland until the passage of the act of assembly of 1832; and that the Supreme Court of the United States refused to entertain an appeal from such rulings of the former Circuit Court of this District, (*Van Ness vs. Van Ness*, 6 Howard, 62); and, also, from like rulings from this court as now constituted. *Wiley vs. Brown*, 4 Wall., 65.

But we all are, nevertheless, of the opinion that an appeal does lie to the General Term, in such cases, under the terms of the organic act; and that the decision in *Couglan vs. Poulson*, 2 Mac Arthur, 208, announces the correct doctrine on the subject.

2d. It is insisted by the caveator, that the record presents no "case" within the meaning of the statute, secs. 803-6, R. S. D. C.

Sec. 805 declares that where an appeal is taken from the decision below on a motion for a new trial, "*a bill of exceptions or case shall be settled in the usual manner.*"

Notwithstanding some intimations to the contrary in one or more cases in our reports, we are of the opinion that the statute does not require the preparation of "the statement of facts," or "agreed case," spoken of by the books of practice; but in the language of this court in *Dant vs. District of Columbia*, 3 Mac Arthur, 273, "*a case containing all the testimony is the proper practice when the motion for a new trial is founded upon its insufficiency, or where the damages are excessive. In no other mode can the legal effect of the evidence produced at the trial be determined in review of the verdict.*"

In the cause before us, the record contains the certificate of the judge that it embodies all the evidence adduced on both sides at the trial; and it therefore presents *the case* contemplated by the statute.

3d. The caveator insists that the record contains no *bill of exceptions* as required by the statute, and, hence, that we are not at liberty to examine the questions of law intended to be presented for our consideration.

The record shows plainly that the caveatee excepted to the granting of each of the six instructions asked by the caveator, which were given by the court; but the objection is that there is no *separate* bill of exception signed by the judge, and that the statute is not complied with where they are merely embodied in *the case* certified by the trial justice.

We are of opinion that the objection is not well taken, and that there was no necessity for any more formal presentation of the alleged errors. And this we intended should be explicitly settled by the decision in *O'Neil vs. The District of Columbia*, Wash. Law Rep., Vol. 7, No. 32, p. 332.

The construction by the New York courts of the similar provision in their statute is thus announced in *Brown vs. Irish*, 12 How. Prac. Rep., 481: "If questions of law and fact arise during the trial, and the party desires a review upon both, he may incorporate his exceptions in his case, stating them separate from the facts."

4th. It has been earnestly contended on behalf of the caveatee, that the General Term upon this appeal is not confined to the right to reverse where it finds the verdict below was rendered upon "*insufficient evidence*," but that it is our duty equally to award a new trial, if, upon an examination of the evidence, we should be of opinion that the verdict was "against the evidence" or "against the weight of the evidence;" or, to carry the contention to its legitimate result, as expressed in one of the cases relied on, that we are authorized "to set aside the verdict and grant a new trial, where the court, from the evidence, reaches different conclusions of fact from those found by the jury."

In support of this position we have referred to many decisions in the State of New York, which it is claimed are especially entitled to consideration in this jurisdiction, as the construction by the courts of that State of the laws from which the provisions of our Revised Statutes on this subject are derived.

Sections 803 to 806 of our Revised Statutes are substantially copied from Sections 264 and 265 of the New York

Code of Procedure of 1851-2, although there are many verbal departures from the text of the original, and some important changes, as for example, the provision in the New York law that "a motion for a new trial on a case or exceptions, &c., must in the first instance be heard and decided at a special term, (except that when exceptions are taken, the judge trying the case may at the trial direct them to be heard in the first instance at the General Term)," is changed in section 806 Revised Statutes, so as to require the motions to be heard in this District always at the General Term in the first instance.

It will be found that many of the cases referred to by the caveatee's counsel are addressed to the question of the power of the *trial* court to grant new trials in cases where the verdict appeared to be against the evidence or the weight of the evidence.

It had been contended (as in 24 How. Prac., 211, *Allgro vs. Duncan*), that the adoption of the Code of Procedure had limited the power of the trial justice in granting new trials to the causes *enumerated* in section 264 of that code. But the trial justice in that case, while commenting upon what he styles the awkward phraseology of the section, declares, that as it was the clear and plain course under the old practice to grant a new trial, as well where the verdict was *against the evidence* as where it was rendered upon *insufficient evidence*, he would not give a more restricted construction to his powers because of the peculiar phraseology of the section, "A safe rule in such cases," said the judge, "is to apply the former practice and to interpret the obscurities and deficiencies of the code by its light."

The doubts expressed by the profession upon the point seem to have been considered by the revisors as sufficiently important to be noticed in the subsequent Code of Civil Procedure of 1876-7, and section 264 of the former code was so amended when it appeared as section 999 of the new volume as to authorize the *trial* justice to award a new trial not only for "excessive" but also for "insufficient damages;" and as well where the verdict was "contrary to the evidence

or contrary to the law," as where it had been rendered upon "*insufficient evidence*;" and the annotator of the new code remarks that "the amendment relieves difficulties experienced" in several cases which he refers to, among which is 24 Howard, 210.

But no such difficulties ever existed in this jurisdiction with respect to the power of the *trial* justice in granting a new trial, and section 804 Revised Statutes was never supposed to have limited the range of reasons for which the new trial might be granted by the judge who heard the cause.

The only purpose of the enumeration in the section was to designate the cases in which an appeal might be taken to the General Term from the order of the trial justice refusing a new trial; and this enumeration constituted an effective limitation of the right of appeal to the three cases mentioned, viz., where the motion has been urged, either "*upon exceptions, or for insufficient evidence, or for excessive damages.*" In no other case was an appeal to be allowed.

The other decisions cited from the New York reports to establish that the General Term or the Court of Appeals of that State possess a wider range of review on motions for new trial than the enumerated cases, are quite consistent with the theory upon which those courts had determined to construe the Code of Procedure, namely, in conformity with the previous well-established practice in that State. Their General Term had exercised that appellate authority without question before the enactment of the code, and it was not to be assumed that the jurisdiction was to be taken from that court in the absence of express words of denial.

But in the District of Columbia the case was widely different when the Revised Statutes were adopted. It had been settled, time out of mind, in Maryland, that the granting or refusal of a new trial was matter resting in the discretion of the court, and could not be ground for a writ of error or appeal.

From the Circuit Court, as organized before the establishment of the present court, appeals could only be taken to

the Supreme Court of the United States ; and that court had uniformly refused to entertain appeals from the decisions of the Circuit Court granting or refusing a new trial.

This well-settled practice existing here when the act of March 3, 1863, was passed, should only be considered as changed by that act to the extent clearly indicated by its terms ; and no latitude of construction can be allowed in the interpretation of a statute framed in derogation of common law principles. As was said by the court in the case in 24 Howard, 211, *Allgro vs. Duncan*, before referred to, it is a safe rule to apply the former practice and interpret the obscurities and deficiencies of the code by the light of that practice.

In aid of this construction of the section, it is important to note that by Rule No. 60 of this court, where different reasons upon which a motion for a new trial may be made in the court below are specified, it is expressly stated that the decision, where the motion is based upon the allegation that "the verdict is contrary to the evidence," is addressed to the discretion of the court, and is not appealable. Although the rule could not, of course, deprive the suitor of the right if it had been conferred by the statute, its declaration is entitled to great weight in favor of our construction of the statute.

There is not the slightest desire upon our part to circumscribe the methods by which, according to the long established practice in this jurisdiction, the losing party may apply in the trial court for a new trial. The courts of justice would lose much of their value unless this mode of redress against unjust verdicts was tenaciously preserved by the judge, to be applied in his discretion, where he believed the jury have done manifest injustice by returning a verdict against the weight of the evidence.

We are only considering the extent of our authority in cases where application is made to us to review the decision of the trial justice on such motion ; and notwithstanding some intimations to the contrary in some of the prior rulings of this court, we have concluded, after careful review of the

subject in all its bearings that the phrase "for *insufficient* evidence," cannot be construed as authorizing the General Term to consider whether a verdict below was "contrary to the evidence," or "against the weight of the evidence."

By a loose use of language, it may be said that a verdict "*contrary to the evidence*" or "against the weight of evidence" was rendered upon "*insufficient* evidence;" and on the other hand, that a verdict upon insufficient evidence is one contrary to or against the weight of evidence.

But we are dealing with legal expressions in their technical meaning; and it is familiar to all lawyers that evidence offered to a jury in a cause has a two-fold sufficiency, *i. e.*, sufficiency in law and sufficiency in fact; that of its sufficiency *in law*, the court is the exclusive judge; its sufficiency *in fact* is a question exclusively for the jury. The court, in considering the legal sufficiency of the evidence to sustain the case of a suitor or to establish any particular fact essential to his recovery, must examine the proof with respect to its quality and quantity; and this determination by the court is a question of law. And if the court can see that the proof offered is of such a character and volume that it might well satisfy a rational mind of the truth of the position it is introduced to maintain, then it is declared to be *legally sufficient* for the purpose; and it must be submitted to the jury who are the exclusive judges of its sufficiency *in fact*, whether others may differ from them in their conclusions or not. As expressed in a recent decision in Maryland, following numerous familiar cases, "if no evidence is offered, or if it is not such as one in reason and fairness could find from it the fact sought to be established, the court ought not to submit the finding of such fact to the jury." *Griffith vs. Diffenderfer*, 50 Md.

To the same effect is the language in 40 N. Y. Sup. Ct., 181, *Halpin vs. R. R. Co.*, "if there is no conflict, the sufficiency is no longer a question of fact, but becomes a question of law, to be determined by the court."

It is to this *legal sufficiency* that the statute refers, when it authorizes the appeal to this court, and to that inquiry alone have we the right to address an examination.

5th. With this view of the duty devolved upon us, we have carefully examined the evidence in the record, with the suggestive comments of the excellent brief on behalf of the caveatee, and without consuming time unnecessarily in a detailed statement of our opinion upon its different features, it is enough to say that we find ourselves unable to discover from the record that the verdict was rendered upon insufficient evidence.

In arriving at this conclusion, we have been obliged to bear in mind the well-settled canons of law on the subject ; that the verdict must be presumed to be right, and should be sustained, if the evidence by fair construction will warrant the finding ; that the fact that the trial judge is satisfied with the verdict is a circumstance entitled to great weight ; that in any case the court must be satisfied that there are strong probable grounds to suppose the verdict was not according to the justice and truth of the case before it will grant a new trial ; and that it will not be granted where the court can see that real and substantial justice has been done ; that where the verdict may have been reasonably influenced by questions fairly presented as to the *credibility* of the witnesses, the decision of the jury should be disturbed with great caution, if at all ; and that our entire system of jurisprudence is based upon the axiomatic principle, "*ad questionem facti, non respondent judices.*"

The following extract from Waterman on New Trials, is full of instruction and warning on this point :

"The presiding judge has heard, and what is more important has *seen* the witnesses testify ; noticed their demeanor ; listened to their cross-examination. Minute circumstances, which are often the turning point in a case have not escaped him. The evidence has been presented full and fresh to his mind, after being passed through the severe ordeal of judicial scrutiny. He has had the benefit of the siftings of counsel. On the other hand, the appellate court has enjoyed none of these advantages. It receives the testimony on paper, and thus presented, it is always tame, meagre and unsatisfactory. Its whole knowledge of the case being

thus derived, it is but illy qualified to pass an enlightened judgment upon it. The reasons, therefore, for denying to the appellate court the right to reverse the decision of the judge who tried the cause confirming the verdict, possess great weight. It is certain this right should never be exercised except in extreme cases. That the court below deems the verdict not contrary to the evidence is a very strong presumption that it is correct. The credibility of witnesses, depending as it often does, upon their tone of voice and manner of testifying, can seldom be judged of by an appellate court ; on the contrary, when the evidence is spread out on paper, it is quite likely that undue weight will be given to that which is of doubtful veracity, and a verdict which is the result of a careful rejection of what is unworthy of belief, be overthrown from misconception of the true ground upon which it is based." 3 Waterman, 1213.

6th. There remains to consider the sufficiency of the exceptions to the rulings of the court below in granting the prayers of the caveator.

The court, by granting the nine prayers of the caveatee, had placed his case before the jury in the most favorable light claimed by himself, and he had no fault to find with the language of the charge, which was certainly most impartial.

Was there such error in either of the six instructions complained of granted to the caveator, as worked a substantial injustice to the caveatee ?

The first instruction granted on behalf of the caveator was in these words :

" Unless the jury believe from the evidence that the contents of the paper writing, propounded as the last will and testament of Jared L. Elliott, were read to him, and that he fully understood and comprehended the same, and that he signed and declared it to be his will and testament, and that he was at the time of sound and disposing mind and memory, and capable of executing a valid deed or contract, they should find it not to be such."

It is objected that it is faulty : 1st. Because it required

the jury to find that the will was read to the testator, although he might otherwise have understood its contents; 2nd. Because it required the jury to find that he formally *declared* the instrument to be his will; and, 3rd. Because it required the jury to find that the testator was of sound and disposing "*memory*."

Neither of these objections is well founded.

1st. It clearly appears he did not read the will, and it must therefore have been read to him, or he could not have comprehended or understood it. And unless he could comprehend it when it was read to him, it certainly could not be a valid will. And this is all the prayer required should be made to appear. Some form of declaration by the testator that the paper was his will was necessary, and the court in its charge explained what would be a sufficient declaration, as follows:

"If he understood the scheme of his will, if he dictated it or *assented to it*, that would be sufficient."

The instruction placed no weightier burden upon the caveatee than he had announced himself willing to assume, as is shown by the proof.

3d. The words "and memory" were certainly superfluous. The statute, while discarding the idea that a less degree of mental capacity would suffice for the validity of a will than was requisite in the case of a deed or contract, equally dispenses with any greater mental ability. It suggests a test which a jury might readily apply to the case in hand, by reflecting whether, if the instrument had been a contract or a conveyance, transferring part or all the property of the testator, for an inadequate consideration, they could under the proof decide that the claimant was justified in dealing with the dying man under the existing circumstances.

If the words thus inserted implied requirements different from or additional to the statutory measure of capacity, their insertion would certainly have been error.

But it is evidently a mere redundancy of expression, giving another definition of the word "*mind*," derived from the same root or source, and incapable of misleading the

jury ; in view especially of the caveatee's instructions and the charge of the judge.

Indeed, all the criticisms upon the instructions excepted to have reference to a similar use of superfluous definitions, adopted into this case from others whose peculiar features may have called for particular forms of expression neither requisite nor altogether proper here.

If in in the record of each case, as it is tried, are to be incorporated such copious extracts from all prominent cases preceding it, the occasions of criticism and liability to error will increase in each succeeding trial, with the confusion of the jury and the labor of the court.

One of the errors insisted on, especially in connection with the finding in the fifth issue, is, that the jury was allowed to consider the question of undue influence as existing *apart from fraud*. In this we see no error. In the language of the Court of Appeals, in *Davis vs. Calvert*, 5 G. & J. 269, "importunity and undue influence may be fraudulently exerted, but they are not inseparably connected with fraud."

A testator may entertain an unreasonable and unjust prejudice against one nearly connected with him, as a daughter who has married against his will, or a son who has offended him by neglecting his advice in a matter in which a child is not necessarily obliged to yield his convictions. In such a case, undue influence may be exerted by an interested person simply by the mention of the undoubted facts of the case ; and that too, under the guise of remonstrance against leaving a smaller portion to the object of the testator's displeasure. The suggestion itself may suffice to rouse the sleeping hostility and result in the disinheritance of the child in favor of the suggestor. And yet it would be difficult to find, in the proof of these facts, evidence sufficiently strong to the apprehension of a jury to induce them to denounce as *fraudulent* the influence thus exerted. What the character of that undue influence must be which would be required to vitiate a will, is well expressed in the caveatee's instructions as referred to before, and in the charge of the judge, and we see nothing in the rather general principles

announced in the instructions complained of that could have worked injustice to the caveator.

The remaining objection is taken to the supposed inconsistency of the finding. If the verdict to be certified back with the issues was really so inconsistent that the Orphans' Court would be at a loss to know how to enter its judgment, of course it would be error, which the Circuit Court below should have corrected. For the objection that a verdict was "uncertain" is one of those designated in the Rule 60 as not appealable.

But we can see no inconsistency in the verdict. A paper may be "executed and attested according to law," and yet be invalid for mental incompetency, or because of fraud or undue influence. See *Pegg vs. Worford*, 4 Md., 395-6.

For these reasons, we affirm the judgment below.

MICHAEL A. FRENCH vs. WILLIAM H. CAMPBELL ET AL.

EQUITY. No. 6,628.

{ Decided March 26, 1888.

{ The CHIEF JUSTICE and Justices HAGNER and COX sitting.

A general devise over after the creation of a life estate in the same property will pass the fee.

STATEMENT OF THE CASE.

The bill in this case was filed to remove a cloud upon the complainant's title and obtain a construction of the will of Mary French. At the hearing below a decree was passed divesting the defendants of all claim or title to the property in question, and investing Michael A. French with the title in fee simple. The question before the court was whether the complainant took a life estate or a fee simple, under the following will:

"I, Mary French, of the city of Washington and District of Columbia, being of sound mind and disposing memory, calling to mind the uncertainty of life and the certainty of death, and wishing to make proper arrangements with reference to the property of which I am possessed, do make, ordain and publish this as my last will and testament.

"I request that my executor, hereinafter named, shall have my body decently, though plainly, interred, and that a plain marble headstone be placed at the head of my grave, with a suitable inscription thereon, to mark the place where my mortal remains repose.

"I request that my funeral expenses and just debts be paid so soon after my decease as possible.

"I give and bequeath into Michael A. French, the house and lot on 8th street, being part of lot No. 4, in square No. 425, the same I purchased from Aza Gladman.

"I give and bequeath unto my husband, Thomas French, during his natural life, the houses and lot numbered 7, in square 403, being the same that was conveyed by Clement Cox and wife to Lewis Edwards, as trustee for Mary French, by deed bearing date the 7th day of May, 1838, the said

property aforesaid lying and being in the city of Washington.

"This bequest to my husband, Thomas French, is with this limitation and restriction ; that is, if the said Thomas French shall again intermarry, then his interest in said property is to cease, and the benefits and interest thereof are to go to Michael A. French.

"Upon the decease of the said Thomas French, or if he shall marry again, I give and bequeath the said lot No. 7 in square 403 to the said Michael A. French.

"I hereby appoint my friend, French S. Evans, executor of this, my last will and testament."

BRADLEY & DUVAL for complainants :

It is a fundamental maxim upon which the construction of every will must depend that the intention of the testator, as disclosed by the will, shall be fully carried into effect if it be not in contradiction of some established rule of law. This intention must be drawn from the whole context of the will. And it is not necessary to look alone at the words of the gift itself to ascertain the intention as to the *quantum* of the estate devised, if it can be gathered from expressions used in any part of it, what he supposed or intended to be the nature and extent of it. That words of inheritance are necessary to convey a fee is certainly a good, general rule of the common law ; but, in the case of wills, it is entirely subordinate to expressions of the testator's intention. The statute respecting wills allows men to dispose of their lands not by any technical terms, but at their will and pleasure. *Abbot vs. Essex Co.*, 18 How., 202, 215 ; *Smith vs. Bell*, 6 Pet., 68, 75 ; *Lambert's Lessee vs. Paine*, 3 Cr., 47.

The intention is to be gathered from the "whole context," the "four corners," of the will. The introductory clause, or preamble, as it is sometimes called, has always been considered in manifesting the intention, it has been designated the key of that intention ; and from the earliest reported cases, where the introductory clause expresses an intention to dispose of the whole of testator's estate, the courts have

brought this clause down and coupled it with the devise, where the words of the devise admit of passing a greater estate than for life, to assist in ascertaining the intention. *Keunon vs. McRoberts*, 1 Wash., 96, 100 ; *Wright vs. Dunn*, 10 Wheat., 204 ; *Burwell vs. Mandeville's Excr.*, 2 How., 560, 577 ; *Finley vs. King*, 3 Pet., 346, 378 ; *McConn vs. Lay*, 5 Cr. C. C., 548 ; *Schrivver vs. Meyer*, 19 Pa. St., 87 ; *Fogg vs. Clark*, 1 N. H., 163 ; *Doe vs. Haiter*, 7 Blackf'd, 488.

The language used by the testatrix in the case at bar in the introductory clause of her will is: "Wishing to make proper arrangements with reference to the *property* of which I am possessed ;" and in the devise itself, after limiting a life estate to her husband, Thomas: "If the said Thomas French shall again intermarry, then his interest in said property is to cease, and the *benefits and interest thereof* are to go to Michael A. French. Upon the decease of said Thomas, or if he shall marry again, I give and bequeath the said lot No. 7, in square 403, to the said Michael A. French." It will be observed that the testatrix knew how to give a life estate if she intended only that estate to pass to complainant.

The words "property" and "interest," like the "estate," will pass a fee. 2 Jarman (4th edition), 133, note, 140-41; *Pitman vs. Stevens*, 15 East, 505 ; *Pearson vs. Housel*, 17 Johns., 281 ; *Burwell vs. Mandeville's Ex'r*, 2 How., at 577, 578 ; *Andrew vs. Southouse*, 5 Term R., 292.

Again, it is very common to construe what seems a life estate in terms, to create a fee in remainder, because of a prior life estate having been expressly created in another in regard to the same property. Chief Justice Shaw denominates this a rule of construction, and says the presumption is that such devise was, in the mind of the testator, a final disposition of that part of his estate, and to effect that purpose it must be a fee. *Plimpton vs. Plimpton*, 12 Cush., 458, 463 ; *Motzer vs. Cassin*, 2310 Equity, S. C. D. C. ; 1 Redf. Wills, 466 ; *Butler vs. Little*, 3 Greenlf., 289 ; *Cook vs. Holmes*, 11 Mass., 528 ; *Butler vs. Butler*, Wash. Law Reporter, Dec. 8, 1882, Vol. X, No. 49 ; 2 Jarman on Wills, (4th edition) 189 ; 2 Washburne Real Prop., 752.

We submit, then, that the court below properly construed this devise to carry the fee to complainant ; that such was the intention of the testatrix, and that such intention can not only be extracted from her words with reasonable certainty in view of the whole will, and that no other reasonable intention can be imputed to her.

WM. F. MATTINGLY and J. J. JOHNSON for defendants:

The introductory words of this will are relied upon to enlarge the estate of the devisee from a life estate to a fee.

In the first place, it is to be noted that the introductory words in this will do not manifest any intention on the part of the testatrix to dispose of her entire estate ; and the language of the will itself shows that she did not dispose of her personal estate. It is to be presumed from the face of the will that she had personal estate, for she directs her executor to have her buried, and to place a marble headstone at the head of her grave, and directs that her funeral expenses and just debts be paid as soon as possible.

The introductory words are : " And wishing to make proper arrangements with reference to the property of which I am possessed."

The devisee, Michael A. French, was her step-son, being the son of her husband by a previous wife.

Is any one to say that testatrix did not consider it proper arrangement to give her husband an estate for life in this lot, or so long as he remained unmarried, and upon his death or marriage that his son should have it during his life ?

The law favors the heir-at-law, and he is to be disinherited only by an express devise with words of limitation, or by necessary implication. The conceded rule of interpretation is that a general devise, without words of limitation, passes but a life estate, notwithstanding a previous devise of a life estate in the same property.

The rule as to the office of introductory words in a will is as stated by Chancellor Kent, [4 Kent, 541, n. 1]. He says :

"Introductory words to a will cannot vary the construction so as to enlarge the estate to a fee, unless there be words in the devise itself sufficient to carry the interest; such introductory words are like a preamble to a statute, to be used only as a key to disclose the testator's meaning."

See also *Wright vs. Denu*, 10 Wh., 204; *Jackson vs. Wells*, 9 John., 222; *Jackson vs. Bull*, 10 John., 148; *Beall vs. Holmes*, 6 H. & J., 205. [The court in this case refers to all preceding leading cases, and lays down the rule in Maryland. It is cited and approved by Kent.] 2 Jarman on Wills, 125 [171], 138 [187-8].

Mr. Chief Justice CARTER delivered the opinion of the court.

In this case the court have come to the conclusion to affirm the decree below. The case involves the construction of a will, and the question is, whether the complainant takes a fee-simple or a life estate only. The question is not novel in this court. The issue has been once made and determined in an essentially parallel case, in which we came to the conclusion that the language used here conveyed an estate of inheritance. It is contended, however, that our decision is in conflict with early and repeated decisions both in Great Britain and this country, which have always held that a general devise over, without words of inheritance, after the creation of a prior life estate in the property devised, will pass but a life estate. But, while this may be so, we are constrained to believe that our judgment is in thorough consonance with good sense and with that principle which pronounces the intention of the testator the supreme and overruling consideration governing the construction of wills. The construction put upon this class of devises in the cases alluded to appears to be in contravention of the rule of construction adopted by the courts in ascertaining the will of the testator, and, marvellously enough, the courts confess it. We might just as well say, following that line of decisions, "although we believe the testatrix designed in this instance to devise an estate of inheritance, we never-

theless decide that the devisee shall not have it because the technical terms of the conveyance do not import it: and although a will, unlike all other conveyances, is not dependent upon technical terms, but such terms are overruled by the intention of the testator, nevertheless we determine that these technical terms shall rule to the suppression of the purpose of the testatrix." That is what we would be saying if we followed these decisions. Of course it is important that established rules of construction should be preserved, even though it be at the cost of sometimes sacrificing the intention of a testator. But it has always been held that where a rule of judicial interpretation obviously fails to answer the purpose for which it was created and plainly operates in contravention of the intention of the testator, then the rule loses its application. What was the intention of testatrix here? Did she intend to pass a life estate or an estate of inheritance? Here is the language:

"I give and bequeath unto my husband, Thomas French, during his natural life, the houses and lot numbered 7, in square 403, being the same that was conveyed by Clement Cox and wife to Lewis Edwards, as trustee for Mary French, by deed bearing date the 7th day of May, 1838, the said property aforesaid lying and being in the city of Washington.

"This bequest to my husband is with this limitation and restriction; that is if the said Thomas French shall again intermarry, then his interest in said property is to cease and the benefits and interests thereof are to go to Michael A. French."

She put two unmistakable qualifications to the title of Thomas French, one was marriage, and the other death. There can be no mistake about the estate created in his case. It was less than an estate of inheritance, and it left the remainder of the property to pass on to somebody and in some way. Then she proceeds to say that upon the decease of the said Thomas French, or if he shall marry again, she gives and bequeaths the said lot No. 7, in square 403, to Michael A. French.

Now, in an ordinary reading of the English language as estimated by those who speak and write it, the conclusion would be spontaneous that this testatrix intended to give a life estate to Thomas French and an estate of inheritance to Michael A. French. That is the way it would be understood by all laymen. Nobody would hesitate about it a single moment. And still it is claimed that, read in the light of the law, this language means another life estate. Where was it to go then when that had expired? She had no children. In the ascending line it was to go to collaterals or their descendants. Now, did she contemplate such a disposition of her property as that? In our opinion she never intended any such thing. That would be simply leaving the disposition of her estate to accident, and would be a mark of want of intention. Whereas the very making of a last will and testament is an evidence of the testator having an intention. We think that this language means that, after the determination of Thomas French's life estate in this property, Michael French is to take whatever remains of the estate the testatrix possessed. That is what this court held in a case similar to this, and it has been so held in a like case in Massachusetts, in a very learned and able decision, reported in 12 Cushing. *Plimpton vs. Plimpton*, 458. That decision alone, if there were no others, ought in my opinion to consecrate so self-evident a rule of reason, especially as against a line of authorities which do not profess that they are following reason, but simply precedent.

Mr. Justice Cox, while concurring in the conclusion of the court, said :

I concur in the conclusion announced by the Chief-Justice, with some hesitation, and on somewhat different grounds from those that have been expressed. A very interesting question in the case was, whether a previous gift of a life estate in a will would justify or require the court to interpret a subsequent devise over of the same estate, expressed in general terms, and without words of limitation, to mean a fee simple. Now it seems to me that that would be a most

reasonable rule of interpretation. I can hardly conceive that a man or a woman would devise a life estate, and then give the property over generally, intending to give only a subsequent life estate; and yet I must confess the weight of authority is in favor of the defendant upon this point. In fact there is only one decision, excepting that of this court, on the other side, viz., the decision of Judge Shaw, reported in Cushing. That is a decision of very high authority. It was made a long time ago, and Judge Shaw states it there as if it were a settled rule of interpretation. He says that when there is a previous life estate and then a general devise afterwards, the latter is to be interpreted as a devise of the fee simple, and I was prepared to find that rule established by an abundance of authority; but I should say that the weight of authority is the other way, because there are numerous cases cited both from the English and the American reports strongly in point upon that question, and holding the opposite of Judge Shaw's rule. But I believe that in almost every instance, and probably in this case, a general devise by a testator, especially by an illiterate or unlearned testator, is intended to pass the fee simple; and I fall in with the inclination of the courts to lay stress upon any other feature in the will which assists in interpreting the general devise in that direction. In this way I think there is language in this will which materially aids the court in coming to the conclusion which has been announced. After giving the life estate to her husband, the testatrix says that the bequest is with the limitation and restriction that if he shall marry again then his interest in said property is to cease, and the benefits and interests thereof are to go to Michael A. French. Now, on the part of the defense, it has been contended that this language merely contemplated the continuance of Thomas French's life estate in Michael A. French; that the terms "benefits and interest thereof," referred to the life estate of Thomas French, and that that was what she intended to give to Michael A. French in the contingency contemplated. But that cannot be, for this reason: the clause expressly provides that upon the marriage

of Thomas French his interest in the property is to cease, and, therefore, that estate cannot be intended to go over to Michael French. And even an illiterate testator would hardly be guilty of the philological enormity of saying that the interest of Thomas is to cease, and yet that the "benefits and interests thereof" are to go over to Michael. It seems very clear that the terms "benefits and interests" apply to the *property*; that the interest of Thomas in the property is to cease, and then the "benefits and interests" *of the property* are to go to Michael A. French. What is the meaning of this word "interest?" It has received interpretation over and over again. It means the title; and if the testator had said, "I devise my interest in the title of said property, after the death of Thomas French, to Michael A. French," it would hardly be stronger than it is here, as the expression of a wish that the whole title of this property should in a certain contingency go to Michael A. French. I think, therefore, that the provision in this clause is, that upon the marriage of Thomas French the whole fee simple interest and title in this property shall go over to Michael. This provision in the will contemplates not merely the contingency of marriage, but also that of death, and it can hardly be contended that the testatrix meant to give a less estate in the case of marriage than in the case of death. The provision is only intended to emphasize and repeat the previous clause, and to extend it to the contingency of death equally with that of marriage. Having already provided for the case of marriage, she then goes on and says that whether he marries again or dies, it is her desire that the property shall go over to Michael A. French on the same terms and in the same state, in case of death, as previously provided for in case of marriage. Clearly it was not intended to give a less estate in this last case, but the intention was that the property should pass over in the same state exactly as in the case of marriage, and there is no distinction made between those two contingencies. I look upon the last clause as obviously a mere repetition of the previous one, and the extension of its provision to the other contingency. So the

fair interpretation of this paper is, that either in the case of the marriage, or of the death of Thomas French, the whole estate shall go over to Michael A. French. It is principally upon this ground that I concur in the conclusion that the intention was to give Michael a fee simple in case of the death or marriage of Thomas French.

NOTE.—The case referred to in the opinion as having been decided in this court is that of *Motzer vs. Cassin*, 2310 Equity. It was decided November 2, 1871, but no report of the case has ever been published, nor does it appear that any written opinion was ever filed. An examination of the record and papers, however, shows the following :

The plaintiff, Fanny L. Motzer, filed her bill against William D. Cassin, March 13, 1871, praying a partition of a house and lot in Georgetown, D. C. She claimed an interest in fee under the will of Ann T. Washington, and the only question before the court was whether a life estate or a fee passed by the will, the material parts of which were as follows :

“I, Ann T. Washington, of Montgomery County, in the State of Maryland, being of sound and disposing mind, memory and understanding, considering the certainty of death and the uncertainty of the time thereof, and being desirous to settle my world (*sic*) affairs, and thereby be the better prepared to leave this world, &c., * * * devise and bequeath as follows :

“I give and bequeath unto my son, Lewis W. Washington, of Jefferson County, Virginia, during the minority of his children, James, Mary Ann, and Eliza R. B. Washington, the farm whereon I now reside, called ‘Greenhill,’ together with furniture in the house and kitchen, stock farming implements, and all other personal effects being thereon, and after the said children have attained, the said James to the age of twenty-one, and the said Mary Ann and Eliza R. B. to the age of eighteen years, I give and bequeath unto them, share and share alike, the farm, household furniture, stock and other personal effects hereinbefore named, their heirs and assigns forever. * * *

"I give and bequeath to my neice, Fannie Moutzer, wife of the Rev. Danl. Moutzer, her heirs and assigns forever, a certain lot or portion of ground lying in the city of Washington, and on the street leading from the avenue to National Observatory.

[The following is the clause under which plaintiff claimed :]

"I give and bequeath unto my sister, Mary Peter, during her lifetime, my house and lot, and the furniture in said house lying and being on the corner of Dunbarton and Congress streets, in Georgetown, and after the death of my said sister, I bequeath the furniture in the said house to my said neice, Fannie Moutzer, and the house and lot before named, share and share alike, to my said son, Lewis W. Washington, Fannie Moutzer, James, John and William Cassin.

"I further devise and bequeath to my said sister, Mary Peter, during her life, my negro woman, Christine, and after her death, I will and desire the said Christine to be free from all manner of service or servitude to me, my heirs and assigns forever.

"I also give and bequeath unto the hereinbefore named James Washington, Christine's youngest child, aged two years, to him, his heirs and assigns forever."

The court in special term passed a decree dismissing the bill, on the ground that the plaintiff was entitled only to a life estate in the property. From this decree an appeal was taken to the General Term, where the following decree was passed :

"This cause came on to be heard on appeal from the Equity Court upon the bill, answer and exhibits, and was argued by counsel ; on consideration whereof, the court is of opinion that Fanny L. Motzer, Lewis W. Washington, James, John and William D. Cassin take a fee simple under the will of Mrs. Ann T. Washington, deceased, in the property mentioned in the devise. It is thereupon ordered, adjudged and decreed, that the decree of the Equity Court dismissing the complainant's bill upon the ground that she was entitled to only a life interest in the said property be, and the same is hereby reversed and set aside."

BENJAMIN U. KEYSER, Receiver, &c.,

vs.

GEORGE BREITBARTH, Administrator, &c.

PROBATE. No. 236.

{ The CHIEF JUSTICE and Justices MAO ARTHUR and COX sitting.
 { Decided March 30, 1883.

An appeal from the action of a justice of this court holding a Special Term for Orphans' Court business, is to be taken in the same manner as an appeal from the action of a justice holding any other special term of the court.

STATEMENT OF THE CASE.

This cause came up on appeal from an order of the justice holding the special term of the court for Orphans' Court business. In behalf of the defendant it was moved to dismiss the appeal, because of non-compliance with the requirements of the Maryland Act of 1798, chap. 101, sub chap. 15, sec. 18.

N. H. MILLER in support of the motion :

The act of 1798, requires, in case of an appeal, the transmission of a transcript of the proceedings in the Orphans' Court, duly certified by the register of wills. Although the powers and jurisdiction of the Orphans' Court of the District were by act of Congress of June 21st, 1870, sec. 4 (16 Stats., 161), thereafter to be held by a justice of the Supreme Court of the District, holding a special term for that purpose ; yet by sec. 5 of the same act, all laws and parts of laws relating to the Orphans' Court so far as applicable to the Supreme Court, are continued in force. The Maryland Act of 1798, chap. 101, sub-ch. 15, sec. 18, prescribing a mode of appeal, is applicable to the Supreme Court of the District ; and appeals from the action of the justice holding the special term for Orphans' Court business are still to be governed and regulated thereby.

R. K. ELLIOT and LEIGH ROBINSON, *contra* :

The 5th section of the act of Congress of June 21st, 1870, while continuing in force all such laws and parts of laws relating to the Orphans' Court as might be applicable to the

Supreme Court, also repealed all such laws and parts of laws not so applicable. The section of the Maryland act is not so applicable, the mode of appeal thereby prescribed being both cumbersome and wholly unnecessary. Moreover, Congress has, since the passage of the act of June 21st, 1870, recognized the decrees and orders in special term for Orphans' Court business of the Supreme Court of the District of Columbia (R. S. D. C., Sec. 930) ; and appeal from such decrees and orders lies in the usual way.

Mr. Chief Justice CARTER delivered the opinion of the court.

By virtue of the act of Congress of June 21st, 1879, this court has succeeded to all the powers and jurisdiction of the old Orphans' Court ; which powers and jurisdiction are now exercised by a justice of this court holding a special term for that purpose. Such special term so held is, to all intents and purposes, exactly similar to any other special term of the court. The 18th section of subchapter 15, act of Maryland, 1798, chapter 101, so far as it prescribes a process of appeal, is not applicable to this court ; our machinery is much simpler and fully sufficient for the purpose. An appeal from the action of the justice holding the Special Term for Orphans' Court business is to be taken in the same manner as an appeal from the action of a justice holding any other special term of the court.

Motion overruled.

JONATHAN MAGARITY vs. JOHN J. SHIPMAN.

EQUITY. No. 7746.

{ Decided May 7, 1883.
{ The CHIEF JUSTICE and Justices HAGNER and COX sitting.

1. If the failure of one of the parties to a contract be but partial, leaving a distinct part as a subsisting and executed consideration, and leaving also to the other party his action for damages for the part not performed, the latter cannot treat the contract as rescinded unless both are returned to the condition in which they were before the contract was made.
2. S., having contracted to build certain dykes, formed a partnership with M., who agreed with S. to do a portion of the work, M. partially performed his portion and then discontinued, whereupon S. entered into a new and different contract with M. in regard to the completion of the same work.
Held, that this new contract was a substitute for and settlement of all that had preceded it and that S. could not thereafter recover for any loss or damage occasioned by M.'s failure to carry out his first contract.
3. Where M., for a share of the profits, agrees to furnish S. with the means to enable him to perform certain work and partially fails, the remedy is at law and the measure of damages is the increased cost to which S. has been subjected by such failure.
4. If, on the other hand, M. was justified in ceasing to furnish the means because of some breach of the contract on the part of S., while he may not claim a share of the profits, *qua profits*, he may have his action for damages.
5. In all the instances above given, the remedy is at law and not in equity.

The Case is stated in the opinion.

ROBERT CHRISTY for plaintiff.

W. WILLOUGHBY for defendant.

Mr. Justice Cox delivered the opinion of the court.

This case has the appearance, at first, of great complication. It grows out of certain contracts between Shipman, originally, with the United States for the construction of dikes on the Ohio river, and it also grows out of some four or five contracts made between Shipman and Magarity. But when we come to sift the facts, we find there is really no complication in the case at all, and that it is very simple. The facts are as follows :

Shipman, having a contract with the United States for the construction of two crib dikes on the Ohio river—one on the Ohio and one on the Kentucky side—took Magarity and

Hoover into partnership with him on the terms that they should furnish security and money to enable him to execute his contract, and in consideration thereof should receive one-tenth of the profits.

This agreement was made July 24, 1879. Work proceeded under it until the fall, during which time the dike on the Ohio side had been nearly completed, but no work was done on the Kentucky side. Disagreement arose between the parties, and a new contract was made, first verbally, and afterwards reduced to writing on February 28, 1880, according to which Shipman was to complete the dike on the Ohio side and receive all the profits on that part of the work as his share of the profits of the partnership, and Magarity was to complete the dike on the Kentucky side and receive all the profits on that as his share of the entire partnership profits. Shipman was also to execute to Magarity a full power of attorney to draw all funds to become due on account of this contract.

But on April 29, 1880, still another agreement was made, according to which Magarity assumed to finish the whole work on both sides of the river, and was to receive all the profits to arise from such work, and Shipman agreed to enlarge his power of attorney so as to enable him to draw all moneys for the entire work. By this agreement Shipman went out of the partnership, and ceased to have any interest in the work except in having it completed so as to relieve him from liability on his contract with the United States. Magarity's only contract with him was to finish the work for the United States. He occupied the position of a public contractor. Magarity partially executed the work, but failed to complete it according to agreement.

It is obvious that this threw upon Shipman the burden of employing some one else to complete it or of doing it himself. And the natural and proximate damage that would result to Shipman from Magarity's failure to perform, would be the cost to him of having the work so completed.

But instead of proceeding independently to protect himself from loss by going on with the work, he entered into a

new agreement with Magarity on the 16th of October, 1880, by which he undertook to do the work which Magarity had agreed to do, in consideration of one-third of the profits to be received from the contract, Magarity agreeing to furnish the money and appliances necessary for the vigorous prosecution of the work.

It seems to be very clear that this contract was a substitute for and a settlement of all that had preceded, and that if it had been faithfully performed by Magarity, Shipman would have had no claim against him upon any of the antecedent agreements, even if no profit should be realized from the work. Supposing Magarity to fail in the execution of this agreement, what was Shipman's proper remedy? If, with Magarity's aid in money and material, as contracted for, the work could be finished at a cost which would leave a certain margin of profit in the contract price to be paid by the United States, and in consequence of Magarity's failure to supply the promised facilities, the cost of the work was increased to Shipman, so as to lessen or extinguish the profit, this increased cost was a damage to Shipman, and furnished him a cause of action against Magarity.

But the argument for the defense has proceeded upon an entirely different theory. It is claimed that when Magarity failed to perform fully his agreement of April 29, 1880, to complete all the unfinished work, Shipman had the right to ignore that agreement and all rights of Magarity under it, entirely; to treat it as if it had never been made, and to deal with Magarity simply as a trustee or agent receiving and disbursing money on Shipman's account, and bound to account for the surplus of his receipts above disbursements. And while it is admitted that this relation between them, and his right of ignoring the contract of April, 1880, were *temporarily* changed and suspended by the agreement of October 16, 1880, and would have been permanently so if that had been carried out, it is contended that since this last agreement was also itself violated, this in turn may be disregarded and the parties treated as relegated to their rights and relations which antedated it. In other words, it is claimed that both

agreements of April and October, 1880, having been broken by Magarity, Shipman is entitled to treat them both as rescinded, and hold him accountable accordingly. It does not seem very clear what advantage the defendant would derive from this, for if these two agreements are rescinded the effect would be to revive the former one of February 28, 1880, which entitled Magarity to complete the Kentucky dike and to take all the profits of such work. But in fact this view of defendant's counsel, which seems to have been adopted by the auditor, ignores a vital principle in the law of contracts, which may be stated in the language of Parsons, vol. II, p. 678, that a person may not treat a contract as rescinded "if the failure of the other party be but partial, leaving a distinct part as a subsisting and executed consideration, and leaving also to the other party his action for damages for the part not performed. Generally, no contract can be rescinded by one of the parties unless both can be restored to the condition in which they were before the contract was made. If, therefore, one of the parties has derived an advantage from a partial performance, or so disposed of property bought that he cannot restore it, he cannot hold this and consider the contract as rescinded because of the non-performance of the residue."

Now, it is conceded that a considerable part of the work stipulated by the agreement of April, 1880, was performed by Magarity and enured to the benefit of Shipman in his contract with the United States. And Shipman neither could, nor, if he could, did he offer to restore the value of that to Magarity, and without that he had no right to rescind. The same remarks apply to the last contract of October 16, 1880.

Instead of simply suing Magarity for not going on to complete the work, or of proceeding on his own account to finish it, and then suing Magarity for the cost, Shipman adjusted all unsettled matters by a new agreement, under which, for what he deemed an adequate consideration, he assumed Magarity's obligation to finish the work, and thus released the latter from any liability for not doing it. Instead of

even attempting to *rescind* the former contract, he released and discharged it. The consideration of his new undertaking was Magarity's agreement to continue to advance means and appliances for the execution of the work, and to allow Shipman one-third of the profits.

It is conceded that Magarity did supply the necessary means with which the work was prosecuted until the working season of that year closed. He refused to proceed further for reasons appearing in the record. But it was too late then for Shipman to rescind the last agreement, because he had received the benefit of a partial performance, and all that he is entitled to is to recover the damages he has sustained by this last breach of contract, which, as already stated, would be determined in part, or wholly, by the increase occasioned in the expense of completing the work by Magarity's failure.

He is not entitled to go back and have an account taken of anything done before October, 1880, or to claim, as he does, for the decrease on the value of the contract with the United States at that time, in consequence of Magarity's previous failure. For at that time he had no interest whatever in the profits of the contract, and he then, with his eyes open, voluntarily accepted a share of the *contingent* profit as a full reward for his undertaking to finish the work. Neither, for the same reasons, is he entitled to an allowance for the time consumed by him in finishing the work, for he agreed to take the chance of profit in full for his time and labor.

The conclusion we have come to is, that if either one of these parties has a cause of action against the other, it is a legal cause of action. If Shipman has a right to recover against Magarity, it is a matter very easily liquidated. It is a claim for damages by a contract that was measured by the increased cost to which he was subjected by Magarity's failure to furnish means. If Magarity, on the other hand, had furnished the promised facilities in the shape of material and other things, then perhaps he might, in a court of equity, be entitled to call upon Shipman by a bill for discovery and ac-

count of profits. But inasmuch as he did not, but ceased in the middle of the work to furnish these means, he had no right to claim part of the profits *qua* profits. If he was justified in so stopping, by some breach of the contract on the other side, he may have his action of damages therefor.

The conclusion of the court, therefore, is that both bills be dismissed without prejudice to the right of these parties to proceed at common law.

JAMES W. WHITE, ANGELICA BROOM AND MARY FRANCES
DAWSON

vs.

JAS. H. HILTON.

LAW. No. 23,123.

{ Decided May 7, 1883.

{ The CHIEF JUSTICE and Justices HAGNER and COX sitting.

1. Though a married woman come into possession of real estate after the passage of the Married Woman's Act of 1869, if her *title* be derived through a will which took effect prior to the passage of the act, her rights in the property are not affected by the act, but are to be determined by the common law.
2. The husband has a freehold in such of the wife's freehold property as she acquired prior to the act of 1869, and although her title be a joint tenancy, he is entitled, in right of his marriage, and during the coverture, to the possession and the rents and profits.
3. Where such a title is held by the husband it is equivalent to a freehold, and ejectment by the wife and her joint tenants to recover the possession, cannot be sustained unless the husband be joined in the action.
4. Where the question is one of personal capacity to sue, as coverture, it should be pleaded in abatement, but where the question is one of *title*, as that the title claimed by one of the female plaintiffs in ejectment is in her husband (who is not a party to the action) and not in herself, this may be shown under the general issue.

STATEMENT OF THE CASE.

This was an action of ejectment brought by the plaintiffs above named to recover possession of part of a lot of ground situated in Washington, D. C., in which they claimed a fee-simple.

The title of the plaintiffs was derived from the following clause of the will of William Magill, executed in November, 1842: "I devise to Ann Hardy part of lot one (1) in square nine hundred and seventy-five (975), together with all the improvements thereon, during her natural life, and at her decease, I devise said property to my three grandchildren, Angelica Fowler, James William White, and Mary Frances White, them and their heirs forever."

The testator died in 1843, and the will was probated in the same year. Ann Hardy, the life tenant, died in 1876.

The above facts were shown upon the trial, but in addition it appeared that one of the plaintiffs, viz., Mary Frances Dawson, who was the Mary Frances White mentioned in the will, was, before the filing of the suit, and at the time of trial, a married woman; that her husband was living, and that there had been children born of the marriage. At the close of the plaintiffs' case, defendant's counsel moved the court to instruct the jury, "that the plaintiffs could not recover in the present action because of the non-joinder of the husband of the co-plaintiff, Mary Frances Dawson, he being a necessary party." The motion was granted, and the court instructed the jury to return a verdict for the defendant, which was done, and the case came before the General Term upon an exception to this instruction.

W. K. DUHAMEL and C. F. ROWE for plaintiffs:

The devisor left a life estate to Ann Hardy, with a remainder to the plaintiffs and their heirs; such at common law is a joint tenancy. 1 Greenleaf's Cru., 364; 3 Id., 330, Tit. 38, c. 15, §§ 6 and 7; Tuckerman vs. Jefferies, 11 Mod., 108; Hurd vs. Lenthall, Stiles, 211, 3 Bacon Abr., 681; Doe vs. Southern, 2 B. and Adol., 685.

The Maryland acts (1794, c. 60, § 8, and 1797, c. 114, § 5) for partition recognize joint tenancies, and have relation to persons who cannot act for themselves.

Because they permit a severance does not destroy joint tenancies, as every adult could destroy the tenancy. 2 Williams' Real Property, 132.

A joint tenancy existed in Maryland by the common law. *Mayberry vs. Brien*, 15 Pet., 35 ; *Hannan vs. Towers*, 3 H. & J., 149 ; *Johnson vs. Howard*, 1 H. & McH., 281.

And that State, by the act of 1822, c. 162, simply reversed the rule of construction. Even if the courts and bars of Maryland and the District have so long remained in error, a new rule would be against the policy of the law and disturb the titles to estates. *Peters vs. Suters*, 2 Mac A., 519.

The act of 1876, it is said, ignores them ; therefore they do not exist. But they are not within the evil sought to be remedied by the act. It seeks to compel a partition. In joint tenancy, each tenant by his own act can destroy.

This court has, however, recently recognized the existence of joint tenancies. *Butler vs. Butler*. (Aute, p. 96.)

Mrs. Dawson being a joint tenant, no right has ever vested in her husband which requires him to be a party. 1 Glf. Cru., 166 ; Id., 842, 364 ; *Williams' Real Property*, 219.

Again, the life tenant died and the plaintiffs only became seized December 28, 1878 ; seizen is necessary to entitle the husband to any right, and the statute has intervened ; 2 Kent Com., 29 ; *Dunn vs. Sergeant*, 101 Mass., 339.

The record does not show that she was married at the passage of the act or at the death of the life tenant.

But assuming the husband was a necessary party, or had rights, such defects must be availed of by plea in abatement, and could not be made on the general issue. 1 Ch. Pl., 66 ; *Green vs. Liter*, 8 Cr., 242 ; 2 Wh., 306.

Ann Hardy was left a life estate, and the testimony shows she occupied the premises after the death of the devisor. It is a presumption of law that she occupied under, and her possession was that devised by the will. *Colver vs. Warford*, 20 Md., 395, 396 ; *Austin vs. Bailey*, 37 Vt., 223 ; *McCall vs. Pryer*, 17 Ala., 537 ; *Hall vs. McLeod*, 2 Metc. (Ky.), 102.

There having been possession by the devisor and the life tenant, it was only at her death their title accrued ; in 1878. *Webster v. Cooper*, 14 How., 502.

We are not obliged to show a perfect legal title ; we may show color of title and possession ; or possession alone is suf-

ficient, and the devisees of one who died possessed is entitled to recover. *McCall vs. Pryor*, 17 Ala., 536, 537; *Smith vs. Lorillard*, 10 John., 354; *West vs. Pinn*, 4 W. C. C., 693; *Hylton vs. Brown*, 1 W. C. C., 204; *Turner vs. Aldridge*, 1 MacAl., 232; *Robinson vs. Campbell*, 4 Wh. 224 (n. a); *Christy vs. Scott*, 14 How., 292; *Burt vs. Panjaud*, 99 U. S. 180; *Campbell vs. Rankin*, 99 U. S., 261.

BRADLEY & DUVAL for defendants :

The proof shows that the alleged possession of plaintiffs was under the Magill will, by virtue of the devise of a vested remainder to them as tenants in common ; but in that estate the husband of one of the plaintiffs, Mary F. Dawson, *in jure uxoris*, had a life estate as tenant by the courtesy, and as such tenant was entitled to the possession and profits to the exclusion of his wife. There was no error in the ruling of the court below that he should have been a party plaintiff in this action, for he was a necessary party.

A tenant by the courtesy initiate may sue alone for the possession of his wife's land and for damages for withholding it. *Gregg vs. Tesson*, 1 Black, 150; *Jackson vs. Leek*, 19 Wend., 339; *Thompson vs. Green*, 4 Ohio St., 216; *Tucker vs. Vance*, 2 A. K. Marsh, 458; *Chambers vs. Handley*, 3 J. J. Marsh, 98.

It has been held, however, that the wife must join. *Bratton vs. Mitchell*, 7 Watts, 113.

At common law the husband's interest in the estates of which the wife was possessed, at the time of the marriage was a freehold, he alone having the right of entry and the present right of exclusive enjoyment. The wife could not recover the lands from a stranger, even though her husband was joined as defendant, and disclaimed title, and admitted the wife's right to possession. *Clark vs. Clark*, 20 Ohio St., 128.

Actual seizen is not necessary in order to entitle husband to courtesy. It is sufficient that the wife had title and a potential seizin or right of seizin—that is, the right to

demand and recover the immediate possession. *Bush vs. Bradley*, 4 Day, 298; *Kline vs. Beebe*, 6 Conn., 494; *Stoolfors vs. Jenkins*, 8 S. & R., 175.

The general rule is, that only persons may join in bringing an action at law whose interests are joint or united. Hence on a joint demise the title proved must be joint, or the plaintiffs cannot recover. *Taylor vs. Taylor*, 3 A. K. Marsh, 19; *Hoyle vs. Stowe*, 2 Dev., 318.

If one of the plaintiffs has no title the co-plaintiffs cannot recover, even though they be vested with the whole title, for the joinder of too many plaintiffs is ground for nonsuit on the trial, whether the action be for tort or on contract. *Murphy vs. Orr*, 32 Ill., 489.

In trespass it is a settled rule that all the plaintiffs must be competent to sue, otherwise the action cannot be supported. *Marsteller vs. McClean*, 7 Cranch, 156.

In any event, if there was no courtesy, and the husband of the plaintiff (*Dawson*) could not have sued alone for possession, his wife must have him made plaintiff with her; for, at common law, the wife had no right to sue alone at law in any case.

The estate and interest of the husband of the plaintiff, *Mary F. Dawson*, was not, and could not be, affected by the Married Woman's Act (April 10, 1869); it is true, the life estate to *Ann Hardy* did not fall in until after the passage of that act; but the estate to the devisees, the plaintiffs, was a vested estate in remainder from and after the death of the testator, in 1842; the statute is not retroactive. *Hart vs. Dean*, 2 Mac A., 60.

Mr. Justice Cox delivered the opinion of the court.

This was an action of ejectment. The material facts of the case are, that in making out title in ejectment, the plaintiffs relied upon a will executed by *William Magill*, in November, 1842, in which he says: "I devise to *Ann Hardy* part of lot one in square nine hundred and seventy-five, together with all the improvements thereon, during her natural life, and at her decease I devise said property to my

three grandchildren, Angelica Fowler, James William White and Mary Frances White, them and their heirs forever." The testator died in the year following the making of his will, that is, in the year 1843, and the will was then admitted to probate. Ann Hardy, the life tenant, died in 1876. Just here it will be observed, that the title accrued originally to this plaintiff, Mary Frances White, now Dawson, by virtue of the will, as far back as 1843, before the passage of the Married Woman's Act of 1869, while it is true that she only got the property in possession in 1876, after the passage of the Married Woman's Act. But as the title was derived by her from this will in 1843, we think her rights in relation to the property are to be determined by the common law, and that the case does not come within the operation of the act of 1869. She and her co-tenants then instituted an action of ejectment, which is the case before us; and at the trial it appeared that Mary Frances Dawson, one of the plaintiffs, had a husband, and also children of the marriage, living; and the plaintiffs having rested their case, the defendant, by his counsel, moved the court to instruct the jury that the plaintiffs had shown themselves out of court, and not entitled to recover in the present action because of the non-joinder of the husband of the co-plaintiff, Mary Frances Dawson. The answer made to this by Mrs. Dawson is, that she was a joint tenant; that in case of her death the rights of the survivors would be paramount to any right as tenant by courtesy in her husband; that he is not entitled to courtesy in the property in which she is one of the parties interested, and has no interest in it, and therefore it is not necessary that he should join in the suit.

Now, all that may be very true, but there is really no question of tenancy by courtesy in the case. The husband would not become such until the death of the wife. But independently of any question of title by courtesy, the husband has a freehold in the wife's freehold property by the fact of marriage; he has the exclusive right to the possession, and rents and profits of it, and that is equivalent to a freehold

during the coverture. It is an interest that his creditor can seize upon execution, as was determined by this court in the case of *Bank vs. Hitz*, 1 Mackey, 111, and as is held in all the common law books. So that the husband, as a party interest, has the exclusive right to the wife's freehold during coverture, although it is held in joint tenancy. Consequently, the wife does show that the property which is claimed here is really for the purposes of personal possession and enjoyment, in her husband, who is not a party to the suit. It is claimed that this objection should have been made by way of plea in abatement, and cannot be taken advantage of at the trial. If it was a mere question of personal capacity to sue, that would be so ; the wife's coverture should be pleaded in abatement. But it is a question of title. At the trial of the case, when the claimants try to make out their title, they show one-third is in another party, and consequently they cannot recover. It is therefore appropriate to the general issue to show that the title claimed by one of the female plaintiffs is in her husband and not in herself. We think the court below was right in ruling that the plaintiffs had shown themselves out of court by this proof, and the judgment is therefore affirmed.

EMIL JUSTH vs. BENJAMIN HOLLIDAY.

LAW. No. 20,516.

{ Decided May 7, 1883.

{ The CHIEF JUSTICE and Justices HAGNER and COX sitting.

1. Where a contract is made for the delivery or acceptance of securities at a future day, at a price named, and neither party at the time of making the contract intends to deliver or accept them, but merely to pay differences, according to the rise or fall of the market, the contract is a gaming one, and is void as contrary to public policy.
2. The endorser of a promissory note given on account of such dealings as are recognized as gaming transactions, can rely upon their illegality as a defence to an action on the note.
3. In an action to recover money, where the defence set up is that the contract was a stock gambling one, the real question for determination is the *bona fides* of the transaction. It is not the *form* but the *intent* with which the scheme was planned. If neither party contemplated that there should be a delivery of the stock, but merely to pay differences according to the rise or fall of the market, the contract is a gambling one.
4. It is not the province of the court in General Term, on a bill of exceptions to the ruling of the court below, to decide as to the weight of the evidence, and its sufficiency in fact, but to determine whether the record discloses sufficient evidence in law to justify the granting of the prayer refused.

THE CASE is stated in the opinion.

JAMES LOWNDES for plaintiff.

COOK & COLE for defendants.

Mr. Justice HAGNER delivered the opinion of the court.

This is an action brought by the plaintiff against the defendant, upon a promissory note, of which the following is a copy :

"\$8,500

NEW YORK, Feb. 10, 1876.

"Six months after date I promise to pay to the order of myself, with interest at 7 per cent., eighty-five hundred dollars, at the office of Justh & Co., 19 Broad street, value received.

"G. A. CUSTER.

"Endorsed :

"G. A. CUSTER.

"BEN. HOLLIDAY.

"Received, New York, March 21, 1878, nine hundred and twenty-six dollars (\$926.00).

"JUSTH & Co.

A. F., JR."

Besides the pleas of non assumpsit and not indebted, the defendant interposed the following :

“ And for further plea, the said defendant says that the note in the declaration mentioned was executed by the said Custer, and endorsed by this defendant for the amount of an alleged account which the said plaintiffs claimed to have against the said Custer, growing out of certain alleged purchases and sales of stock by the said plaintiffs for and on account of the said Custer. And the defendant avers that there were no *bona fide* sales of stocks by the plaintiffs, to or for said Custer, but the alleged amount for which said note was given was for the difference between the price of said stocks at the time of the pretended sale of them by the said plaintiffs to said Custer, or the pretended purchasing thereof by them for him, and the prices thereof at the time of the pretended sale thereof by said plaintiffs for said Custer, and that said Custer did not deal in said stocks, or buy them of or sell them to the said plaintiffs, or buy or sell them through the agency of the said plaintiffs, or otherwise, and no stocks were ever delivered to said Custer by or through the plaintiffs, or intended so to be, but that the transactions between them, in consideration of which said note was made and endorsed, were wagers upon the prices of said stocks, and that no other or different consideration passed between the said plaintiffs and Custer, or defendant, for the giving or endorsement of said note, and the defendant did not know, at the time he endorsed the same, what the consideration thereof was.”

Issue was joined upon these pleas, and the case was tried before a jury, which rendered a verdict for the plaintiff for the amount of the note and interest, after crediting the \$926, which the plaintiff stated he had received on account from the estate of Custer.

At the trial, the plaintiff proved the execution and endorsement of the note and its due protest, and there rested.

The defendant thereupon read in evidence the testimony taken under a commission issued on the order of the plaintiff, who was the only witness examined.

He testified in chief, in his own behalf, and was cross-examined by the defendant. There were produced by the plaintiff, and returned with the commission, three communications addressed by General Custer to the plaintiff, and several accounts, which he stated represented the transactions between him and General Custer, so far as he was able to furnish the same. And this being all the evidence in the case, the defendant prayed the court to grant the following instruction :

"If the jury believe from the evidence that the note in the declaration mentioned was given by the said Custer and endorsed by defendant for a balance of accounts, alleged to be due from said Custer to the plaintiff, and that such alleged balance arose upon alleged purchases and sales of stocks by Justh & Co., in the name of said Custer, or to or for him, and that no stocks so alleged to be purchased by Justh & Co., in the name of said Custer, or alleged to be sold to or for him, were ever delivered to him, and that it was the intention of the said parties that such stocks should not be delivered to said Custer, but that he should receive only the profits on the alleged purchases and sales of said stocks, if any should be made, or be liable for the losses, if any should occur, then such transactions were illegal, and the plaintiff cannot recover."

The case comes here upon exceptions to the refusal of the court to give this instruction to the jury :

1st. The general principle is well settled as to the conditions which will invalidate contracts of the description referred to in the prayer.

In the excellent work of Mr. Dos Passos, of the New York bar, on the Law of Stock Brokers, it is thus stated : " Where a contract is made for the delivery or acceptance of securities at a future day, at a price named, and neither party, at the time of making the contract, intends to deliver or accept the shares, but merely to pay differences, according to the rise or fall of the market, the contract is void, either by virtue of statute or as contrary to public policy." P. 477.

All observers agree that the inevitable effect of such deal-

ings is to encourage wild speculations ; to derange prices to the detriment of the community ; to discourage the disposition to engage in steady business or labor, where the gains, though sure, are too slow to satisfy the thirst for gaming when once aroused ; and to fill the cities with the bankrupt victims of such disasters as any " Black Friday " may develop. As was well expressed in 55 Pa. State, 298, Bruce's Appeal, "Anything which induces men to risk their money or property without any other hope of return than to get for nothing any given amount from another, is gambling, and demoralizes the community, no matter by what name it may be called."

The extent of this form of speculation now rife in our country is unprecedented, unless perhaps by the almost universal gambling transactions that distinguished the era of the famous South Sea Bubble.

Mr. Dos Passos states in his work that according to financial authorities the sales of stocks alone, at the New York Stock Exchange, in the year 1881, reached the enormous total of 128,162,466 shares, representing in cash at \$100 each share, the prodigious sum of twelve billion eight hundred and sixteen millions two hundred and forty-six thousand dollars. No one doubts that much the larger part of these transactions were illicit as gaming contracts. And when it is remembered that this fierce greed for gain without labor has to so great an extent subjected to the same wild speculation the commodities necessary to sustain life, that the humblest housekeeper is frequently the innocent sufferer by mere wagering transactions, the far-reaching extent of this pernicious traffic may, in some degree, be realized. The plainest principles of propriety and public policy, therefore, should warn the courts to adhere tenaciously to such protection against the further spread of the evil, as they have been able to interpose to the recovery upon contracts originating in stock gambling.

2nd. That the endorser of a note given on account of such dealings as are recognized as gaming transactions can rely upon their illegality as a defense to an action on the note,

was settled as far back as 1794, in the case of *Steers vs. Laskley*, 6 T. R., 61. There the defendant was engaged in stock-jobbing transactions through a broker, and the plaintiff had acted as one of the referees to determine the amount due to the broker on the dealings. The broker drew upon the defendant to pay part of the adjudged sum. The bill was accepted by the defendant and endorsed by the broker to the plaintiff, who sued the defendant to recover the amount of the bill. Lord Kenyon non-suited the plaintiff, being of the opinion that as the bill grew out of a stock-jobbing transaction, which was known to the plaintiff, he could not recover upon it.

In overruling the motion for a new trial his lordship said: "The bill on which the action is brought was given for these very differences, and Wilson (the broker) could not have enforced payment of it. Then the security was endorsed over to the plaintiff, he knowing of the illegality of the contract between Wilson and the defendant, for he was the arbitrator to settle their accounts; and under such circumstances he cannot be permitted to recover on the bill in a court of law."

And so the law remains to this time. *Dos Passos*, 478.

3rd. It was insisted on behalf of the plaintiff that the present case should be withdrawn from the operation of the rule as to wagering contracts, since the plaintiff was only the *agent* of Custer, to negotiate for the stocks with other persons who should be considered as the principals who made the purchases.

But conceding the facts to be as supposed, still that circumstance would not prevent the defendant from interposing this defense. The point has been passed upon in several of the cases cited in the argument.

In *Ex parte Green*, 7 Bissell, 342, the court says, in answering this objection:

"These parties, it seems to me, fall within the statute. They advanced the margins at the time to make the gaming contract, and without their aid in that respect the contracts would not have been made. * * * So, if these contracts

are gaming contracts, they must be held to have advanced the money for margins to make them, and their claim for repayment falls within the prohibited class mentioned in the act. They made the illegal contracts and advanced the money required to give them colorable validity. To take their case out of the statute would be establishing a most flagrant evasion of its provisions."

So in *Gregory vs. Wandell*, 39 Michigan, 337, the defendant, the broker, insisted that he ordered the grain from warehousemen in Chicago, and that he had offered the warehouse receipts from these parties to the plaintiff. But his defense of agency was not suffered to defeat the recovery, it appearing that the whole transaction, though adroitly covered up with convenient entries and the intervention of suppositious go-betweens, was, after all, a mere wagering bargain, for a settlement of differences.

We have failed, however, to find in the record, any evidence to show that the plaintiff did purchase any stocks for Custer from other brokers or any other persons.

So far as the evidence shows, if any stocks were in fact purchased by Custer, they were bought from the plaintiff, and if any sales of stock were made on account of Custer, they were made by the plaintiff himself; and hence the question of agency does not properly arise in the case.

4th. That the ruling of the court was correct in its rejection of the defendant's prayer has been earnestly argued on several grounds.

(a) It is insisted that the instruction was faulty, because it denies the plaintiff's right to recover in case the jury should find that the parties did not intend *the stocks should be delivered to Custer*; whereas, it is argued, that the transactions might have been perfectly licit, notwithstanding it might have been the intention of the parties that the stock should not be *delivered to Custer himself*; as, for example, that it should be retained by the broker after purchase and placed in his strong-box for safe-keeping, until sold upon the owner's order.

The language of the instruction is to be considered in the

light of the defenses pleaded in the trial, and which it was designed to present for the opinion of the court by the prayer.

If the defense to an action was *usury*, and that word were inserted in a prayer offered at the trial, it could scarcely be contended, on appeal, that the instruction was faulty because the word in one sense (and that its primary one) signified *legal* interest. In view of the character of the defense presented in such an action, it would be practically impossible that a jury of ordinary intelligence would so misunderstand the sense in which the word was employed.

So, in the case at bar, no question was raised or hinted at as to the *manual reception* into *Custer's possession* of the stock; nor was there any point mooted as between its reception by *Custer himself* and its possession by *his agent*. Any such question would properly have been regarded as trivial and unimportant, since it is quite clear that if the plaintiff had made a *bona fide* purchase for Custer, under which the right of property was to pass to his principal, the reception of the property by the broker would have been properly regarded as the equivalent of its reception by Custer himself.

The real question for determination was as to the *bona fides* of the alleged purchases and sales; whether, in effecting such alleged purchases, any stock was actually obtained from the possession of any other person and transferred or communicated either to Custer personally or to his agent; and further, whether it was the intention of the plaintiff and Custer that the stock was to be obtained from the possession of any person and transferred to that of Custer or his agent, so that Custer would take title to what some one else parted with, or whether, on the other hand, it was their intention that there should be no such surrender of stock by any third person and no equivalent gain of such stock by Custer. And, with the view of presenting this idea of reception of title or interest by the alleged buyer, the expression "*delivered to Custer*" was used, and in no other. A purchaser in London this morning, who *bona fide* has bought stocks by telegraph through a broker in New York, may correctly be

said to have had them *delivered to him* to-day, as a mode of expressing the *bona fides* and completeness of the transaction, while the word would not be applicable to a stock-jobbing bargain concocted between two parties in New York, though sitting side by side in the Stock Exchange. In view of the pleadings and evidence in the case, it is inconceivable that the defendant's counsel could have thought of placing his case upon the point whether it was the intention of the parties that the stocks should be delivered to *Custer* rather than to *his broker*. The expression, "and that it was the intention of the said parties that such stocks should not be *delivered to the said Custer*," was the equivalent of saying, "and that it was the intention of said parties that such stocks should not *pass to or become the property of Custer*."

The next member of the sentence is manifestly used in opposition to what just precedes it—"but that he should receive only the profits on the alleged purchase and sales;" and that opposite sense is only made apparent by rejecting the idea that the previous words "*delivered to said Custer*" only meant to imply the reception of the stock into his own manual possession.

The same expression was used in the sense we have ascribed to it in several well considered cases. Thus in *Ex parte Young*, 6 Bissell, 65, Judge Blodgett, of the Northern District of Illinois, in citing a decision in that case, says: "Judge Tree held that option contracts for grain, when the parties intended only to pay the differences, and not to *deliver the grain*, were void as wagering contracts." And the judge, in the principal case, uses a similar expression: "The parties when they made the contract did not intend to *deliver the grain*, but only at the utmost to settle the differences." See, also, *In re Green*, 7 Bissell, 844; *Yerks vs. Solomon*, 18 N. Y. Sup. Ct. (11 Hunn.); *North vs. Phillip*, 89 Pa. St., 250; *Milchor vs. Western Union Telegraph Co.*, 11 Fed. Rep., 198.

And in the recent unreported case of *Roundtree vs. Smith*, in the Supreme Court of the United States, the same expression is to be found, as descriptive of a genuine *bona fide*

purchase and sale, as opposed to fictitious one. See, also, *Girzewood vs. Blane*, 11 C. B., 527.

But even if the proposed construction had been considered faulty because of its supposed equivocal language, we cannot but regard it as an unfortunate omission that no instruction was given in lieu of that proposed. The question involved in the trial was one of great importance, sufficiently presented by the pleadings; and one which the courts have constantly held was for the determination of the jury; as was said in the case in 11 C. B., *Girzewood vs. Blane*, in which the court left it to the jury to say what was the intention of the parties at the time of making the contract, and whether either party really meant to purchase or sell the shares; instructing them that if such intention did not exist, the contract was a gambling transaction and void.

By submitting the case to the jury without any instructions after rejecting the only one offered, they were left without guidance as to the law in a case novel in this jurisdiction, without instruction as to the proper application of the evidence; and, even without information of the important function expressly devolved upon them of passing upon the intention of the parties to the contract.

It is further insisted that the instruction should have been refused, because there was no evidence in the case to sustain the supposal of the prayer.

It is not our province to decide as to the weight of the evidence and its sufficiency in fact to sustain the defendant's position, but only to determine whether the record discloses evidence sufficient in law to justify the granting of the instruction offered, or of one more explicitly stating the law. And after a careful examination of the proofs we are satisfied that there was such evidence before the jury legally sufficient to be submitted for their consideration.

It is well settled that *the form* of such a transaction is not conclusive. As was said by the court in 11 Hunn., before cited, it is not the form in which the trick or device is presented that avoids the contract, but *the intent* with which the scheme was planned. And in *Ex parte 7 Bissell*, the court

says : "The fact that the parties charged the bankrupt with the price of the grain when he ordered it to be purchased, and credited him with the price it sold for when sold, cannot prove what the real transaction was. That only represents the form, not the nature of the transaction. It was as well to keep the account in that way when the real intention was to speculate in and pay only the differences, as when the sale was of the article itself."

It is in the light of these considerations that the testimony is to be examined.

The parties to this transaction were General Custer, an army officer, and Emil Justh and his partner Frank, Wall street brokers. General Custer met his death bravely among the savage foes of the nation ; and his testimony is absent. Of the survivors, Justh was examined in his own behalf in New York, but his testimony was introduced by the defendant after Justh had declined to read it to the jury. Frank is still employed in Justh's office in New York, but he was not examined. Justh produces two letters and a note from Custer, which are the only statements we have from the deceased respecting the transaction. It seems to us impossible to read these papers without being impressed with the idea that they refer to an illicit business, with which Custer was rather ashamed to be connected. If the indebtedness which had accumulated within the preceding seven months had been the result of legitimate transactions, as of the actual purchase of stock or other property, or the loan of money, Custer would never have used such language as this : "I have acknowledged to you verbally and in writing that I am indebted to you, and should you deem it your interest to resort to law, I will certainly, if placed upon the stand, acknowledge the same fact in open court," &c. In the second letter he says : "The circumstances under which this debt was contracted render my obligation concerning it peculiarly binding, and I consider my honor pledged to effect the discharge of my indebtedness to you at the earliest date practicable."

Such language men use when speaking of the so-called

"debts of honor," and not of their legitimate, ordinary money transactions.

The note of December, 1875, bears the same impress. It is in these words: "My dear Justh: If you will do so, would like you to put a stock order on P. at $\frac{1}{4}$ below the opening price, and to sell one thousand L. S. with stop order $\frac{3}{4}$ above opening price. If you do not feel disposed to do this, please drop me a line, and send it here by messenger not connected with your office. Yours, G. A. C." The poor man showed more caution in this communication than he displayed in his last fatal campaign. Why should he ask Justh's permission or consent to sell the stock, if he was really ordering his own property to be sold; and why such secrecy, that required that the reply should be brought by a messenger not connected with Justh's office, unless he was engaged in a gambling stock transaction, which he was unwilling should be known? And these writings are produced by the plaintiff himself.

Justh, the only one of the parties to the contract who was examined, is a broker of twenty years experience. It is most improbable that he was unacquainted with the state of the law upon this subject, for few classes of persons are more intelligent and shrewd in business affairs than the New York brokers. He must have seen from the commencement of the cross-examination where the pinch of the case was, and that his best chance of gaining it, if he was entitled to do so, would be to make straightforward answers to substantially the same questions repeatedly propounded to him. For it would only have been necessary for him to swear that it was the intention of his firm and Custer, that the purchases and sales of stock were to be *bona fide* transactions, instead of mere speculations or margins entered into without any intention that any property should be really bought or sold or change hands, and to support his statement by such accompanying proofs as would be readily forthcoming in any regular, honest transaction of purchase and sale, to secure the amount of his claim. But these answers he studiously and repeatedly refused to give, avoiding a direct reply in every form of subtle evasion.

Thus he was asked on cross-examination: "Was he (Custer) a purchaser of stocks or securities for investment, or for the mere purpose of speculation with the intention that the profits only should be paid to him?"

Justh objects to the question, and then answers, "I do not."

Again: "Was that your understanding of the arrangement between you—that is, that you should execute orders for him in the purchase or sale of stocks, and that you should pay to him merely the profits accruing to him from these transactions, and that you should not in fact deliver to him the stocks purchased by you?"

A. "There was no arrangement whatever mentioned."

Q. "Was it not your intention in transacting this business to simply settle differences with General Custer, you paying him any profits in the transactions and he making good any losses?"

A. "Well, I had no intentions expressed or even spoken of. The nature of the business is such that customers have a right to ask for the money they have to their credit."

Q. (Question repeated.) "Was it your intention?"

A. "We had no intentions when we received any orders except to execute them; we only execute orders."

Q. "In what way did your transactions with General Custer differ, if at all, from the ordinary transactions of brokers buying and selling for customers on a margin?"

A. "In no way."

And again—

Q. "When you entered into this business of buying and selling stocks for General Custer, had you yourself any intention to have the stocks paid for by General Custer and delivered to him?"

A. "Brokers have no intentions. I only execute orders, and when executed, the disposition of the stocks is made by the man who gives the order."

It is difficult to believe that such responses would have been made by a broker who had been engaged in *bona fide* purchases and sales of stocks, not denounced by the courts

as illicit. Nor is it easy to understand why he did not promptly silence the charge of illegality by a straightforward story that could have been told in a single sentence, if the facts had existed to justify it.

What the broker does say in the progress of his cross-examination is equally significant.

He is asked :

Q. "Are you able to specify any case in which you bought stocks for the purpose of delivering them to General Custer?"

A. "Impossible. I did not know what his intentions were when he gave me an order."

Q. "What were *your* intentions?"

A. "To execute orders given, and to pay for them."

Q. "He was dealing on a margin, was he not?"

A. "Well, I trusted him, you know, naturally."

Q. "Is that the only answer you can make?"

A. "I trusted him, certainly."

He explains that the note from Custer of December, 1875, quoted above, was a "stop order," which he defines to be a direction to the broker to buy and deliver stock if the market reached a certain point. He admits that he had dealt in "puts" and "sold stocks short" for Custer by his direction; and his testimony abounds throughout in similar expressions from the vernacular of the stock market, which would naturally be used in describing illicit purchases and sales upon margin.

The statements of the accounts are consistent with dealings of the same character.

The first transaction they refer to is under the date of May 17, 1875. On that day he charges Custer with "100 shares of L. S. stock," at a certain price, and with "commissions, \$12.75."

Under the same date he credits Custer "by 100 shares L. S. stock, at a stated price, less "\$12.75 commissions."

Under the date of the 19th of May, there are similar entries of alleged purchases and sales and commissions. On this first venture Custer is represented as the gainer by \$188

and the broker's charges for buying and selling the same stocks amount to \$50.

During the six months of the speculation the profits credited to Custer amount to \$552, and the broker's commissions to \$1,840, and Custer's net losses are stated at \$8,578. The aggregate of the stock transactions during this period appears to have been \$889,983.

It appears that Custer was unable to pay the balance due in December, 1875, and the dividend paid from his estate in 1878 on the claim, would indicate that it could not pay more than ten cents on the dollar.

The disparity between the pecuniary ability of Custer and this immense amount of purchases and sales within half a year's time, would certainly be regarded by business men as a circumstance in contradiction of the idea that he intended to make actual contracts so much beyond his means of payment. In *In re Green*, 7 Bissell, 344, the court, speaking of a transaction insignificant in comparison with this, says: "It is self-evident from the testimony and the condition of the parties that these sales were not *bona fide*. The bankrupt was not a dealer in grain, he was a country merchant of little or no means, and had no money to invest in wheat, which fact both Green, his brother, and Norris knew. The idea that they bought for him several thousand bushels of wheat with the expectation that he was to pay for it was preposterous."

It would be infinitely more preposterous to suppose that this broker bought more than a quarter of a million of dollars worth of stock for this soldier within these few months with the expectation that he was to pay for it.

Much stress was laid upon the decision of the Supreme Court in the unreported case of *Roundtree vs. Smith*, above referred to. In that case the court held that there was such an absence of all evidence that the transaction complained of was a gambling in stocks, that the court should not have submitted the question to the jury.

But the facts of that case were widely different from those in the case at bar. There the plaintiff, who was seeking to

escape from liability, when asked what his intention was when he gave the particular orders—whether he designed an actual purchase or only a speculation in differences—answered: “I cannot say.” And he admitted that he had on other occasions made *bona fide* purchases from the same broker about the same time. The other party to the contract, the broker, unequivocally testified that the transaction was in all respects a *bona fide* purchase and sale; and the Supreme Court might well have held that there was a failure of evidence to sustain the plaintiff’s contention.

In the case at bar, we cannot resist the conclusion that there was abundant evidence legally sufficient to go to the jury, in support of the supposal of the defendant’s prayer; and believing that the instruction correctly stated the law, we think it was error to refuse it.

Judgment reversed and new trial awarded.

WILLIAM W. McCULLOUGH vs. DILLER B. GROFF.

LAW. No. 22,112.

{ Decided May 7, 1883.

{ The CHIEF JUSTICE and Justices HAGNER and COX sitting.

1. Where, in a reference to an auditor under the Act of Md., 1785, ch. 80, the proceedings before the auditor are such as in actions of accounts, the right of hearing before the court as to all questions of law, and of trial by a jury upon all matters of fact, is to be preserved to the contestants.
2. And where the auditor undertakes to decide all questions of fact it would seem to be clearly against the spirit of the statute to admit the report before the jury even as *prima facie* evidence of the truth of its assertions or conclusions.

THE CASE is stated in the opinion.

EDWARDS & BARNARD and HANNA & JOHNSTON for plaintiff.

F. W. JONES and JESUP MILLER for defendant.

Mr. Justice HAGNER delivered the opinion of the court.

This action was brought on the common counts, for lumber and materials furnished, and for money due on account stated. The amount claimed by plaintiff was \$3,342.30, with interest from November 7, 1878.

The defendant pleaded in abatement that certain equity suits between the same parties, which were brought to foreclose mechanics' liens, involving the same cause of action, were still depending in this court.

Issue was joined on this plea, and the cause was tried on that issue before a jury, March 23, 1872, the result of which was a verdict and judgment for the amount of the plaintiff's claim.

The defendant moved for a new trial, which was granted.

Afterwards the defendant pleaded: 1, not indebted; 2, payment; and, 3, set-off; claiming on account annexed, \$1,775.

The plaintiff joined issue on the pleas, and replied "not indebted" as to the set-off; and the defendant joined issue on this replication.

At the next term, when the case was called and before the jury was sworn, the following order was passed:

"This case being reached for trial, and it appearing to the

court that it is necessary to examine and determine mutual accounts between the parties in this case, orders that the accounts and dealings between the parties in this case, as the same are stated and set out in the pleadings in this case, be audited and stated by the auditor of this court."

When the auditor was about to commence his investigation under this order, the defendant interposed an objection to any proceedings before the auditor, "because it hath not appeared that it may be necessary to examine and determine on mutual accounts between the parties, and because the court had not discharged any jury before ordering the reference to the auditor."

The auditor proceeded to take the testimony of the parties, as well as of other witnesses produced before him, and returned a report, in which he stated, as the result of his examination, that there was due from the defendant to the plaintiff the sum of \$2,812.10, as of November 7, 1878.

To this report the defendant filed these three exceptions :

" 1. Because the auditor omitted to credit the defendant with the sum of \$1,000 for compensation for services in building a brick warehouse.

" 2. The defendant denies that he purchased from the plaintiff the lumber and other articles mentioned in the account filed by said auditor ; denies that he agreed to pay the prices mentioned in said account for them ; denies that they are worth such prices as are set down in said account, and denies that said lumber, &c., was delivered to or received by the defendant.

" 3. He excepts also for other errors, uncertainties and improper charges apparent on the face of said report and account."

When the cause was called for trial, the plaintiff read to the jury the order of reference and the report of Mr. Payne, the auditor, against the objection of the defendant, and thereupon rested his case and moved for a judgment for the amount stated in the report as due by the defendant. The defendant insisted upon his exceptions to the report and claimed that he had a right to a trial by jury upon the matters therein set forth.

In the words of the record, the court thereupon stated to the defendant's counsel that the defendant had a right to a jury trial upon the matters stated in his exceptions ; but should they not be sustained by proofs, the report of Jas. G. Payne, above alluded to, would be given to the jury as the basis upon which they might find a verdict ; and directed the defendant to proceed to the jury with his testimony.

The defendant thereupon introduced witnesses to prove the performance by him of work for the plaintiff, in support of his plea of set-off, and to impeach the correctness of the plaintiff's charges for materials ; and offered to prove by his own testimony that when he remonstrated with the plaintiff for charging him in his account book at higher rates than he had agreed to supply him, the plaintiff replied, " Oh, never mind the books ; I don't want my clerks to know our business arrangements ; when we come to settle, and you get your bill, you can take it and mark all the prices down to those we had agreed upon." To the admissibility of this testimony the plaintiff objected, and the first exception was taken to the overruling of this objection.

1st. If the action of the court in admitting the report of the auditor before the jury was correct, this objection was untenable. Such declarations of a plaintiff would certainly be admissible under ordinary circumstances as tending to impeach the correctness of his present claim, by proof of previous admissions that he knew it was too large. But if the report of the auditor, with the account referred to, were improperly before the jury, the evidence excepted to, with much that preceded, was irregularly presented. It therefore becomes proper to examine the Rule No. 54, under which the reference to the auditor was made, with the Maryland act of 1785, ch. 80, §12, upon which the rule was based.

The section of the act is in these words :

" That in all actions brought or hereafter to be brought in any court of law of this State, grounded upon an account, or in which it may be necessary to examine and determine upon accounts between the parties, it shall and may be lawful for the court where such action may be or remain for

trial, to order the accounts and dealings between the parties to be audited and stated by an auditor or auditors to be appointed by such court, and there shall be such proceedings thereon as in cases of actions of account."

The rule is narrower than the act, since it is confined to cases of "mutual accounts between the parties; whereas the statute applies as well to "all actions grounded upon an account."

The law is nearly a century old, and must have been repeatedly acted upon, and yet there is no reported decision in Maryland giving it an explicit construction. For in the only two cases found in the reports of that State in which it seems to have been considered, the court contented itself with pointing out the irregularities in the particular cases without stating what would have been the proper mode of procedure.

The statute was three times considered by the old circuit court in this District, and twice by this court as now organized.

But the decision in the first case of the circuit court, *Barry vs. Barry*, 3 Cranch, 120, is at variance with the conclusions announced in the subsequent cases of *Bank vs. Williams* and *Bank vs. Johnson*, reported in the same volume.

In *Campbell vs. District of Columbia*, 2 Mac Arthur, p. 583, the court only declared that the case was not a proper one for a reference. And in *Strong vs. District of Columbia*, 3 MacArthur, p. 499, they simply disapproved of the manner in which the report of the auditor was presented to the jury.

We are, therefore, not much assisted in our examination of the question by the researches of our predecessors.

There had been an earlier law in Maryland, 1778 (March), ch. 9, respecting suits brought by the State against defaulting receivers of public money; by section 5 of which the general or county courts were empowered, if need be, to appoint auditors to state the accounts offered by such defendants, and to give judgment for such balance as should appear to be due on the return of such auditor."

The act of 1785, ch. 80, evidently contemplated a less

summary mode of disposing of the report of the auditors to be appointed under its provisions, by declaring that there should be such proceedings upon the audit "as in cases of actions of account."

Without going into an explanation of the mode of procedure in that antiquated and almost obsolete form of action, it is enough to say that it allowed repeated appeals, during the progress of the audit, to the court, where issues of law or of fact, as from time to time they were raised before the auditors, were triable, *toties quoties*, before the court or the jury, according to the nature of the particular question presented. And as it was also a principle controlling the subject that no matter in bar of the action was examinable before the auditor, such defenses as were properly pleadable in bar must have been disposed of by jury trial, or otherwise, before the judgment of *quod computet*, which was the necessary forerunner of the audit, was entered. Hence, at one stage or another of the proceedings, a trial by jury upon all matters of fact was obtainable by the parties.

When, therefore, the proceedings before the auditors under the act of 1785, ch. 80, were to be such "as in cases of actions of account," the right of hearing before the court as to all questions of law, and of trial by a jury upon all matters of fact, was intended to be preserved to the contestants. And where, in point of fact, the auditors have undertaken to decide all questions of fact incorporated into their report, without a reference to a jury, although such trial had been insisted on by one of the parties, it would seem to be clearly against the intent and spirit of the statute to admit the report before the jury even as *prima facie* evidence of the truth of its assertions or conclusions.

In my judgment it was designed by the rule that in case of mutual accounts, where in the opinion of the judge it was necessary to do so, the court, with a view of lightening the labors of the jury and saving time, should depute to auditors the ministerial duty of arranging, methodizing and explaining the accounts, examining the calculations, and reporting the result of their labors to the court. In the cases where

such a reference would be considered necessary, an inquiry of this nature would devolve upon the jury and counsel great labor, which could be but imperfectly performed during a trial, and then with constant liability to mistake. Frequently such examinations would require the production in court of numbers of papers and books, perhaps from public offices, at hours when they could not conveniently be spared from official use. Few counsel, not trained accountants, would wish to trust themselves with the important interests of their clients without the assistance of trained experts in book-keeping where complicated accounts of partnerships or banks were involved ; and in case of a refusal by either party to call in such aid, this statute and rule would authorize the court to compel such an examination by its selected agents.

But I do not think the statute or the rule attached such weight to this audit as to authorize it to be read in evidence to the jury, in proof of any claim of either party controverted by his opponent at the trial, unless it had previously been admitted by the pleadings or before the auditor.

By analogy to practice in somewhat similar cases, the objection to the auditor's report should be made by exceptions, which certainly should be expressed with reasonable precision ; and if taken to such a report as I think the auditor is limited to by the law, would be confined to errors in formal matters of the accounts.

It might be that under this construction the auditor's work would prove of small value ; but it might also, if the suitors were both really anxious for a full and fair settlement, result in a great economy of time and labor, and clear up mutual misunderstandings previously existing between the parties. And it may well be that the discontinuance of several of the cases referred to in the authorities, resulted from the full statements of the positions of the contestants, for the first time brought to their attention in this manner by impartial accountants.

However this may be, we must construe the law and the rule as we find them ; and in my opinion there was no warrant in either for the submission of the audit in evidence

before the jury, "as the basis upon which they might find their verdict."

2d. It was further inadmissible in evidence, because it was founded in part upon the testimony of witnesses other than the parties, taken before the auditor. By the statute 4th Ann, ch. 16, which authorized actions of account to be brought by one joint tenant or tenant in common against his co-tenant, the auditors to be appointed were authorized to administer an oath *to the parties* and examine *them*; but, as was said in *Wisner vs. Wilhelm*, 48 Md., 1, no such right exists to examine other witnesses. And that case further decides that even a special clause in the order of reference, authorizing the auditor to examine any witnesses, was invalid. Such a report would be the mere statement of the opinion of an unauthorized person, founded upon extrajudicial oaths, in matters beyond his legal competency, and in the highest degree hearsay.

We will add that we have no doubt the reference might be made as well before the jury was sworn as afterwards; and that the second exception of the defendant, if it had been interposed to a valid report, should have been held to be too general in its terms, for it amounted to nothing more than the general issue plea to a declaration in *assumpsit*.

Since it results from this view of the subject that the trial below was conducted upon wrong principles, we must remand the case for a new trial; and it is not necessary for us to examine the two other exceptions presented by the record.

With the purpose of preventing similar embarrassment in the future, we have thought it proper to substitute for Rule 54 one more explicit in its terms.

Judgment reversed and new trial awarded.

THE UNITED STATES, EX REL. EMINEL P. HALSTEAD, Administrator of the Estate of JOHN N. and JOHN J. PULLIAM,

vs.

A. U. WYMAN, Treasurer of the United States.

LAW. No. 24,413.

{ Decided May 28, 1883.

{ The CHIEF JUSTICE and Justices HAGNER and COX sitting.

1. Letters of administration granted by the Orphan's Court of this District upon the local assets of a deceased non-resident entitle the administrator to receive and receipt for moneys due his intestate in the Treasury of the United States, at Washington.
2. Whenever such payment is a mere ministerial function, not involving the exercise of official discretion, and the officers of the Treasury refuse to pay the administrator, a mandamus will lie from this court to compel such payment.
3. Such moneys constitute personal assets of the deceased within this District.
4. Since the repeal of the act of June 24, 1812, by omission from the Revised Statutes, foreign administrators can neither sue nor be sued as such in the District of Columbia.

THE CASE is stated in the opinion.

A. L. MERRIMAN for plaintiff.

W. A. MAURY for defendant.

Mr. Justice HAGNER delivered the opinion of the court.

This is an application by the petitioner for a writ of mandamus to enforce the payment to him, in his representative capacity, by the Treasurer, of the three drafts described in the proceedings.

In response to the usual rule to show cause, the Treasurer has filed an answer, and the question has been fully argued by the counsel.

The facts requisite to an understanding of the case appear to be as follows :

By a law passed May 1, 1882, entitled, "An act for the allowance of certain claims reported by the accounting officers of the United States Treasury Department," it was enacted, "That the Secretary of the Treasury be, and he is hereby authorized and required to pay, out of any money in the Treasury not otherwise appropriated, to the several persons in this act named, the several sums mentioned herein, the

same being in full for, and the receipt of the same to be taken and accepted in each case as a full and final discharge of the several claims examined and allowed by the proper accounting officers, under the provisions of the act of July 4, 1864, since December, 1880, namely * * * to John J. Pulliam, of Fayette county, Kentucky, \$1,228 ; to John J. Pulliam, of Fayette county, \$545 ; to John J. Pulliam, ex'r of John N. Pulliam, deceased, of Fayette county, \$3,020."

Two drafts were issued by the Treasurer, payable by himself as Treasurer, to the order of John J. Pulliam, for the two sums first named, and a third draft payable to John J. Pulliam, as executor of John N. Pulliam, for the remaining sum.

These drafts were delivered to Halstead, the petitioner, the attorney and agent of John J. Pulliam, and are in his hands at this time.

John J. Pulliam, before endorsing the drafts, died in Tennessee, of which State he was a citizen. There has been no administration upon his personal estate in Tennessee, but an administrator was appointed in that State upon the personal estate of John N. Pulliam.

The petitioner, claiming to be a creditor of both of the Pulliams, applied to the Orphans' Court of the District of Columbia for letters of administration upon the estate of each of the Pulliams, and obtained letters of administration from that court.

Afterwards, a bill was filed in equity in the Supreme Court of the District, by Keyser, as receiver of the German American Bank, against Halstead, as administrator, and against the Tennessee administrator of John N. Pulliam, claiming for the bank an interest in so much of the proceeds of the drafts as belonged to an agent of the Pulliams, by virtue of an assignment to the bank, and asking that the bank's claim should be recognized and discharged in the administration of the personal estates of the two Pulliams. To that bill Halstead, the administrator, answered, and a *pro confesso* decree was obtained against the Tennessee administrator of John N. Pulliam ; and after evidence taken,

a decree was passed appointing Halstead a trustee, and requiring him to endorse the drafts in his quality of administrator and trustee, recognizing the claim of the bank, but directing the administrator to settle his accounts in the Orphans' Court, and reserving final action upon the claim until that settlement.

The petitioner states that he endorsed the drafts according to the direction of the decree, and presented them for payment to the Treasurer, who refused to pay them; and this petition is filed in the absence of any other remedy in the premises.

The death of the payees in the draft rendered it necessary that the payment should be made to some properly constituted representative of the deceased claimants. When such person should present them to the Treasurer it would appear that his duty to pay them was a perfectly plain one, in no degree involving the exercise of anything in the nature of official discretion; but more evidently a plain, ministerial function than this court recently held in the case of *Key vs. Frelinghuysen*,* was devolved upon the Secretary of State to pay out money appropriated to discharge an award of the Board of Commissioners under a treaty with Mexico.

That the petitioner's appointment was regular is not a matter that can be questioned ordinarily in a proceeding like this. The Treasurer in this case, as in all others, has a right to ascertain whether the petitioner is the person he claims to be, but with the identification, ordinarily, the inquiry would end, and the payment be made.

But the Treasurer certifies in his answer, that he is advised by the First Comptroller that notwithstanding the action of the Orphans' Court of the District of Columbia in making the appointment, the petitioner has no right to receive these awards, because they do not constitute personal assets of the deceased within this District, which may rightfully be claimed by such an appointee, but that they are properly payable to the personal representative of the domicile where the claimants died, in the State of Tennessee.

*Ante, p. 299.

Assuming that this defense may properly be made by the respondent, the only obstacle to the payment will be removed, if by the decision of a competent court he is advised that the objection is not well founded.

The high official and personal character of the distinguished officials who present this reason for withholding payment of the drafts renders it proper that the question should be carefully considered by this court, and we have given to the subject a painstaking examination.

That the position assumed by the Treasurer is at variance with the general principles governing the administration of the effects of a deceased person lying beyond his place of domicile, is too plain for question. According to the universally admitted theory on the subject, the administrator of the domicile is powerless to sue or compel payment of money due the deceased beyond the limits of the territory where he was appointed, or to collect assets of the deceased in any other jurisdiction; and nothing except a statutory provision, enacted in the place *rei sitæ*, can confer such an authority.

Judge Story, in his work on the Conflict of Laws, sec. 523, uses this language, after stating the principle in emphatic terms:

"So strict is the principle that a foreign administrator cannot do any act as administrator in another State, that where the local laws convert real securities in the hands of an administrator into personal assets, which he may sell or assign, he cannot dispose of such real securities until he has taken out letters of administration in the place *rei sitæ*. Thus mortgages are declared by the law of Massachusetts to be personal assets in the hands of administrators, and disposable by them accordingly. But the authority cannot be exercised by any except administrators who have been duly appointed within the State. So, if on the other hand an administrator sells real estate for the payment of debts, pursuant to the authority given him under the local laws, *rei sitæ*, he is not responsible for the proceeds as assets in any other State, but they are to be disposed of and ac-

counted for solely in the place and in the manner pointed out in the local laws."

It is argued, however, that this general principle has no application in this District *with respect to the moneys in the Treasury*, and that this distinction is well settled by the decisions of the Supreme Court in the cases of *Kane vs. Paul*, 14 Peters, 88, and *Vaughan vs. Northrop*, 15 Peters, 1.

In my opinion the language used in those cases is inapplicable to the existing state of the law within this District, since the adoption by Congress of the Revised Statutes of the District in 1874.

The apparent generality of the language used by the court may be explained by the consideration that when those decisions were announced (1840-1), there was in force within the District of Columbia, as a constituent part of the testamentary law, the act of Congress of 24th June, 1812, which provided that it should be lawful for any person to whom letters of administration or testamentary should be granted in any of the United States or territories thereof, to maintain any suit or action or to prosecute or recover any claim in the District of Columbia in the same manner as if the letters of administration or testamentary had been granted within the District. This law came into force only eleven years after the establishment of the District, and in 1840 seemed to be as firmly fixed as any other part of the testamentary law, and as little likely to be repealed by Congress or omitted in any revision of the statutes as any other provision of the system; and, as it appears to me, it was only because of the existence of this provision, merged as a constituent in the testamentary code at the time, that the court used the language referred to.

In the case in 14 Peters, the court only decided that letters of administration *de bonis non cum testamento annexo* granted in the District of Columbia on the personal estate of a non-resident upon the allegation that the executors who had qualified in Maryland were dead, when one of them was really living, were, for that reason, void; and that upon the appearance of that executor, the administrator *d. b. n.*

was bound to surrender to him the moneys he had collected from the Treasury upon a claim of the deceased allowed by commissioners under a treaty with France.

The court did not undertake to decide that the grant of letters *d. b. n.* here would not have been valid if the executors had both been dead, as was represented to the Orphans' Court when it made the appointment, but as it expressly says, the answer to the question whether the letters testamentary in Maryland should prevail over letters granted in the District of Columbia depends upon the legal character of the latter letters—"are they void or voidable"—and the court declares, as we have stated, that under the circumstances of the case they were "void *ab initio*."

But the court went further, and in answering the inquiry as to what rights letters testamentary or of administration granted in either of the States of the Union can give to an executor or administrator in the District of Columbia, except the right to sue given by the act of 1812, says, that "the right to sue, *in the manner it is given*, gives the right to such executor or administrator to *receive from the Government, either in the District or in the State where letters have been granted*, any sum of money which the Government may owe to a testator or intestate at the time of his death, or which may become due thereafter, or which may accrue from the Government to a testator in any way or at any time."

In the case in 15 Peters, the question presented was whether the next of kin and heirs of an intestate, dying in Kentucky, could sustain a bill in equity in this District against a non-resident administrator of the deceased appointed in Kentucky, to recover their shares of a sum collected from the Treasury by the administrator for military services of the deceased. The court held that the act of 1812 did not authorize such a suit against the Kentucky administrator within the District of Columbia although he was summoned here; but only empowered the foreign administrator to sue and prosecute and recover claims due the deceased, and that moneys so collected from the Treasury constituted assets under the Kentucky administration, and

that distribution should be sought there. It was in reply to the argument that the foreign administrator might be made liable here because the money was collected here and so constituted local assets within the District, that Justice Story, speaking for the court, said :

"The debts due from the Government of the United States have no locality at the seat of Government. The United States in their sovereign capacity have no particular place of domicile, but possess, in contemplation of law, an ubiquity throughout the Union ; and the debts due by them are not to be treated like *the debts of a private debtor which constitute local assets in his own domicile*. On the contrary, the administrator of a creditor of the Government, duly appointed in the State where he was domiciled at his death, has full authority to receive payment and give a full discharge of the debt due to his intestate in any place where the Government may choose to pay it, whether it be at the seat of government or at any other place where the public funds are deposited. If any other doctrine were to be recognized, the consequence would be that before the personal representative of any deceased creditor belonging to any State in the Union would be entitled to receive payment of any debt due by the Government, he would be compellable to take out letters of administration in this District for the due administration of such assets. Such a doctrine has never yet been sanctioned by any practice of the Government, and would be full of public, as well as private, inconvenience."

So far as this opinion sustains the validity of a release by a foreign administrator of a debt due to his intestate, it is but a statement of undoubted law, which has been carried so far that it has been held that a *bona fide* voluntary payment to an administrator of a debt due to the estate is a legal discharge of the debtor, although the grant of administration afterwards proves to have been voidable or even void. *Allen vs. Dundas*, 3 T. R., 125, cited in 14 Peters, 41 ; see also *Mackey vs. Coxe*, 18 How., 104. And this is but an example of a class of cases where the court, in the interest of peace, and to prevent loss to one who has acted *bona fide* under a

mistake induced by an appearance of right or title, sometimes refuses to subject the innocent debtor to the punishment of a second payment without designing in the least degree to endorse the propriety of such a course for the future.

But that the opinion, so far as it declares it to be *unnecessary* for the foreign administrator to take out letters here (for it does not say he may not do so), is founded upon the feature of the testamentary law, which was engrafted upon it by the act of June 24, 1812, in my judgment is sufficiently shown in a subsequent paragraph, where the learned judge, in construing that act, says: "It does not authorize any suits or actions in the District against any such executor or administrator. Its obvious design was, therefore, to enable foreign executors and administrators to maintain suits, and to prosecute and recover claims in the District, *not against the Government alone*, but against any person whatever, resident within the District, who was indebted to the deceased, and to discharge the debtor therefrom without the grant of any local letters of administration. In effect, it made *all* debts due from persons within the District, not local assets, for which a personal representative would be liable to account in the courts of the District, but general assets, which he had full authority to receive, and for which he was bound to account in the court of the State from which he derived his original letters of administration."

It was the act of 1812, therefore, which, according to this statement of the court, had worked so marked a change in the general principles of the law of administration as to convert local assets into general assets; and such words, clearly, would not have been used if that act had not been in existence.

This construction is strengthened by the language of the court in the subsequent case of *Mackey vs. Coxe*, 18 How., 104. This was an action at law brought in this District against the sureties on the bond of one Raines, who was appointed by the Orphans' Court of the District of Columbia administrator upon the personal estate of Samuel Mackey, a Cherokee Indian. There had been an administration at the

domicile of the deceased, and the administrators had constituted Raines their agent to draw the money. But it appears from the opinion of the court that the Treasury Department refused to pay Raines on this order, and required him to take out letters of administration here, which were accordingly granted him by the Orphans' Court of the District. The Treasury officers then paid him the money; and as agent of the Cherokee administrators, Raines receipted to himself as administrator in the District for the money received. He lost his life and the money on his way home, and this suit was brought by the surviving administrator and distributees of the deceased. The court decided that the letters of administration in the Cherokee country were entitled to the same respect as those of any of the States; and proceeding to consider the effect of the act of 1812, which it quotes at length, says: "*Under this law* the money due to Mackey, might have been paid, and indeed should have been paid to Raines, the attorney-in-fact of the administrators of Mackey. But, through abundant caution, letters of administration were required to be taken out in this District as a prerequisite to the payment of the money by the Treasury Department."

It thus appears that the court ascribes the right of the Cherokee administrators to demand the money from the Treasury to the act of 1812, and to that alone. It nowhere says that the Orphans' Court of the District was without authority to grant the letters, or that the claim against the Government was not assets in the District. His receipt to the Treasury as local administrator was recognized as a full discharge of the claim, and the Court throughout speaks of the administration as if it were perfectly valid. Thus, on page 104 it is said: "This suit is brought in the name of the surviving administrators of Mackey and of the distributees. Regularly, an action of the distributees cannot be maintained, unless an application has been made to the Orphans' Court in this District to order a distribution and to authorize or direct the administrator, Raines, to pay the same. This administration being ancillary to that of the

domicil of the deceased, the distribution would be governed by the law of the domicile."

Justices Nelson and Curtis, in their separate opinion, stated that they concurred in the decision of the court, "upon the ground that, as no final account had been settled by the administrators in the Orphans' Court, and no order had been made by the court, either directing the administrator to pay the balance in his hands to the principal administrators, for distribution of them, or directing a distribution to be made by them, there was no breach of the bond. This being an ancillary administration, it depended upon the discretion of the Orphan's Court which granted it whether the money remaining in the hands of the ancillary administrator, after the satisfaction of all claims in this jurisdiction, should be distributed here by the ancillary administrator or remitted to the principal administrators for distribution; and until that discretion shall be exercised, and the ancillary administrator directed which of these courses to pursue, he is in no default, and his surety is not liable."

Certainly there is no intimation here that the grant of letters in the District was void or voidable or in any respect irregular; or that the claim against the Treasury collected and receipted for by the administrator under his letters here, was not assets properly receivable by him like any other assets due the estate of the intestate within this jurisdiction, and these cases occurred while the act of 1812 was in full force.

In Story's Conflict of Laws, already quoted, § 529 *d*, the examination of the claims of administrations under different jurisdictions is continued as follows: "The subject came again under consideration before the same court in *Mackey vs. Coxe*, (just quoted) where it was decided that an administrator appointed in the Cherokee country might receive payment of a debt in the District of Columbia, and his discharge or that of his authorized attorney will be valid. *But this is upon the ground that by the act of Congress he might sue in that District.* He did, however, out of abundant caution, take out letters of administration in that District." And

the author proceeds to state that the true law in regard to ancillary administration is stated in that case by Justices Nelson and Curtis in the opinion quoted above.

It seems quite evident that the learned author who had delivered the opinion in *15 Peters*, attributed to the force of the act of 1812 alone the novel powers ascribed to foreign administrators within the District of Columbia in the decisions above referred to—powers that could not have been claimed at the time within any other jurisdiction in the Union, and which at this time can rightfully be claimed nowhere, unless in virtue of a similar statute.

But, as is well known, since the adoption of the revision of the District laws in June, 1874, the act of 24th June, 1812, is no longer in existence, and we are consequently remitted to the condition of the law in this respect as it existed before the passage of that statute, and which it was the purpose of the legislators to change by its enactment. And I submit, it is impossible to contend, that in the absence of that law, any foreign administrator or any other person can compel the collection of a private debt due here to his intestate, or pass title to personal property of the intestate found here, without first taking out letters of administration from the Orphans' Court of the District.

Is there any ground for supposing that such an administration is unnecessary and improper where the property belonging to the deceased consists of money due from the Government under an appropriation by law?

The money claimed in this case was appropriated by Congress to the Pulliams. They were ascertained sums nominated in the statute and unchangeable to the extent of a cent by any officer of the Government; nor is it in the power of the Government, in any way, to resume ownership of the fund. It belonged to the designated claimants as fully as any property they might justly call their own. It is so completely segregated from the unappropriated money in the Treasury, that by section 806 Revised Statutes, where such drafts as those before us, shall remain outstanding and unpaid for three years, their amount must be deposited by

the Treasurer and covered into the Treasury by warrants and be carried *to the credit of the parties to whose favor they were issued*, or to the persons entitled to receive pay therefor ; and carried into "an appropriation account denominated outstanding liabilities." It is not easy to devise a plan more effectually earmarking the money called for by the draft with the name of its true owner.

And it is an important consideration, in view of the language of the court in 15 Peters, that the provision just cited was adopted in 1866, twenty-five years after that decision. In the same connection, in my opinion, it is important to notice the provision of the act of 1846, 6th August, entitled, "An act to provide for the better organization of the Treasury," which recited that it had been found necessary to make further provision to enable the Treasurer the better to carry into effect the act of September 2, 1789.

By section 1 of that statute—Rev. Stats., § 3591—it was declared that "the rooms provided in the Treasury building at the seat of Government for the use of the Treasurer, his assistants and clerks, with the fire-proof vaults and safes, erected for the safe keeping of the public money, and such other apartments as are provided as places of deposit for the public money, shall be the Treasury of the United States." The article provides for other places where public moneys shall be deposited, under the designation of mints, assay offices and offices of assistant treasurers. The superintendent of one of the mints and of an assay office are constituted assistant treasurers, and the statute declares that the rooms assigned by law to be occupied by the assistant treasurers, together with the fire proof vaults therein or connected therewith, shall be appropriated to the use of the assistant treasurers and for the safe keeping of the public moneys deposited with them respectively.

But when these depositaries are referred to in the laws, they are mentioned by distinctive names, in contradistinction to the establishment at Washington, which with its rooms and apartments was to be recognized as referred to whenever the word Treasury was used. This discrimination is preserved in several of the subsequent sections of the article.

Thus, by §3615, all collectors and receivers of public moneys within the District of Columbia are required, when directed, to pay over all such moneys "to the Treasurer of the United States *at the Treasury*;" whereas, by the same section, the collectors and receivers of public moneys at New York, Philadelphia, &c., are required to pay such moneys to the assistant treasurers at their cities, at their *offices respectively*, not describing them as the Treasury.

So, by section 3641, the Postmaster General is authorized to transfer moneys belonging to the postal service between the Treasurer, assistant treasurers and designated depositaries at his discretion, &c., sustaining the idea that a transfer to an assistant treasurer is not a transfer to the Treasurer, and describing the place of transfer as the official home of that officer.

In *Cooke vs. United States*, 91 U. S., 402, the Supreme Court declared that United States notes which are not made payable at any particular place are, consequently, in law, payable at the Treasury, and this is at the seat of Government, and in the Treasury Department; and that the receipt and payment by the assistant treasurer in New York of such notes, authorized to be retired before maturity, was not a payment or redemption by or at the Treasury Department, and did not retire the notes without a further order of the Secretary.

Other provisions are to be found in the statutes where the expression "Treasury of the United States" is evidently used to denote only the office of the Treasurer located at Washington; as is the case with respect to the redemption of the notes of national banks which have refused payment. The law says they shall be paid *at the Treasury*. Would any holder of such a bank note think of applying to an assistant treasurer or other depositary for its redemption? He might ask for its redemption of every assistant treasurer and mint and assay office from Maine to Alaska, and he would receive a negative answer from every one, nor could he obtain the money until he should apply to the place designated in the law—the Treasury at Washington city. Of course, in a

general sense, all public moneys may be said to be in the Treasury, wherever they may be, but Congress did not mean to enact this truism. It meant, as it seems to me, to draw a distinction between the Treasury proper and its branches and agencies ; to localize the chief treasure house of the nation at the seat of government ; at the place where the Treasurer is required to perform his public duties in the city of Washington, where this money now is.

Why should not the money represented by these debts, and set aside for their payment, be considered local assets here ? It has all the characteristics of other assets. It is vendible and assignable. By the testamentary law of Maryland of 1798, ch. 101, sub-ch. 14, § 3, in force here, "a common warrant for land not executed or located in the lifetime of the deceased, shall be assets after his death, in the hands of an executor or administrator, and subject to distribution, as well as *every debt due to, or just claim of the deceased.*"

That the money appropriated and set apart for the payment of these debts would constitute *debts due to the deceased, and just claims on their part*, it seems impossible to deny. If it is not assets *somewhere*, how can it be received by the foreign administrator in his jurisdiction ? And the Government is as much placing its own indebtedness upon the plane of the indebtedness of one of its own citizens, by admitting the claim of a foreign administrator to receive the money as assets, as it would be if it paid it at once to the administrator within the District. The *common warrant* spoken of in the section quoted above, was an incipient patent of State lands to be exchanged after location for a patent. That which it represented was still within the State offices not yet formulated or separated from the other possessions of the State ; and yet Maryland admitted that such a common warrant should be considered as assets of the deceased.

If the ubiquity properly claimed for the Government of the United States is to be ascribed to the debts due by the Government, there would seem to be no good reason why

those debts should not be payable as well in Washington as elsewhere. Ubiquity implies *universal presence*, not uniform *absence*. And if the debts are to be considered as *everywhere*, it is inconceivable to me that the money especially appropriated and dedicated to pay them, evidenced by the Treasurer's draft payable here, should be held to be absent from the only place in the country where in fact and truth it actually is—in the Treasury of the United States in Washington city.

It was only the debts of the Government which the court declared had no locality at the seat of government. But they are capable of being localized. A draft of the Treasurer payable at Boisé city is not payable elsewhere, although the Treasurer might have directed its payment at some other locality, in which case it would have been payable only at that place. These drafts are payable at Washington, at the Treasury of the nation, and here only they are properly payable as they now stand.

Every consideration of propriety suggests the advantage of making payment to a person appointed here, whose qualification, bond and character can readily be inquired into, rather than to one who may have administered at a great distance, and without real assurance of safety to the fund.

And as it cannot be denied that, under the law as it now stands, there must be local administration here to pass title to all other personalty that may be found here belonging to a non-resident, convenience and equal justice would dictate that this same tribunal should be allowed to administer other personal effects in the form of moneys to be derived from the Government. Why should local creditors be driven to two rival representatives, especially as the law of the foreign jurisdiction might reject their claims, and they might thus be deprived of their just due because of the refusal of the Government authorities to pay the money to the administrator of the jurisdiction where the debts were contracted, perhaps upon the faith that the claim against the Government was to be the source from which those creditors were to be paid?

The other courts of the system within the District have repeatedly taken cognizance of suits respecting funds in the Treasury claimed by rival parties, and have recognized that the moneys in these cases before them were within the District and the jurisdiction of its tribunals. It is true that in the early case of *Comegys vs. Vasse*, in 1825, the circuit court used this language: "The fund out of which the claims are to be paid are in the Treasury of the United States. Where is that? The Treasurer resides at Washington and the head of the Department; but is the money there?" The bill was filed by a bankrupt, claiming an account from his assignees, and that they should discover what amount they intended to claim before a commission under a Spanish treaty on complainant's account, and that they should be enjoined from receiving whatever amount might be decided by the commission under the treaty to be due on that claim, and that a like injunction should go against the Treasurer. It may be that the negative answer of the court to its own inquiry was predicated of the fact that the money had not yet been awarded to the claim, upon the theory enunciated by the Supreme Court of the United States in the case of *Clark vs. Clark*, 17 How., 322, that "the fund had no existence till the award was made."

But whatever may have been the reason for their refusal, it is certainly at variance with subsequent declarations of the same court, and of the Supreme Court of the United States. In the numerous cases arising under the mixed commissions for the adjustment of the claims between this country and Great Britain and Mexico, it seems to have been assumed that the money, after it had been placed in the Treasury for distribution to the American claimants by the Secretary of State or Secretary of the Treasury, was properly to be considered as at the seat of Government. Mr. Justice Wylie, in his opinion in *McManus et al. vs. Standish et al.*, 1 Mackey, 152, examines a number of these cases at length and decides that this court had jurisdiction in that case. All the parties were non-residents, but all the essential ones, it was held, had appeared in the court. In the conclusion of

this branch of his opinion, he says: "We do not wish to intimate an opinion, or an impression even, that if the fund is in the Treasury, and if the party is not here, that that would make any difference. That is not the question to be decided in the cases now under consideration. We are not required to go beyond the fact that the fund is *in the Treasury here*, and the parties claiming the fund are before the court; and this we hold gives us jurisdiction here."

The money referred to in that case was paid by the Mexican Government, and was in the Treasury subject to the order of the Secretary of State, and the justice declares it is in the Treasury *here*.

In this large class of cases which have been before the courts of the District, and many of them before the Supreme Court upon appeal, the action of the courts seems to be consistent only with the idea that moneys thus circumstanced were to be considered as in the Treasury in Washington city.

Thus in the case of *Whitney et al. vs. Dey et al.*, which was a contest between claimants to an award under a Mexican commission, the bill which was filed in 1851, prayed for an injunction against the defendants, who were all non-residents, and also against the Secretary of the Treasury, although he was not made a party to the suit.

The circuit court ordered the injunction to issue before answer or appearance, and it was issued as prayed, served upon the Secretary, and by him respected, as were also the subsequent orders passed by this court after its organization, requiring the payment by the Secretary of portions of the award.

The same course was pursued in the subsequent case of *Clark vs. Clark*, 17 How., 315 (which was cited with approval in *Phelps vs. McDonald*, 99 U. S., 806). There, too, the defendants were non-residents, and an injunction was issued against the Secretary of the Treasury, though he was not made a party.

In the case of *Pemberton vs. Lockwood*, 21 How., 257, the Secretary of State was made a defendant with others who

were non-residents, to a bill seeking payment of part of an award made to the owners of slaves liberated from the ship *Creole*. Mr. Marcy, the Secretary, himself a distinguished jurist, answered the bill, not questioning the jurisdiction of the courts, the money having been placed in the Treasury to pay these awards upon the orders of the Secretary of State.

I will refer now to some cases not arising under the operation of a statute authorizing litigation in this jurisdiction, as was the case with respect to those we have been considering.

In the case of *Ridgeway vs. Hayes*, 5 Cranch C. C. R., 34, where an award by commissioners under a French treaty was the subject of controversy, one of the claimants applied to the circuit court for an injunction against the Treasury officers to prevent the payment of the money out of the Treasury to the defendant. The language of the court in the case of *Comegys vs. Vasse*, before quoted, was cited to show a want of jurisdiction to grant the relief. But the Chief Justice replied : "In the present case the fund is placed in the Treasury of the United States as in a place of deposit only, and the United States are merely trustees ;" and he proceeds to say that he cannot see why the United States, in cases in which they are merely stakeholders, should not submit to these decisions and aid those tribunals in the due administration of justice.

A similar decision was made in the case of *Duthill, adm'r, vs. Courvault*, reported in the same volume, in which Congress, to carry out a French treaty, made a provision for a suit to be brought in the District of Columbia. This was the case that went to the Supreme Court, and is reported in 14 Peters, 33.

In the case of *Milner vs. Metz*, 16 Peters, 221, Metz, as trustee, filed his bill against several non-residents, and the Secretary of the Treasury, as a co-defendant, to enjoin the receipt by the defendant of a sum appropriated by a private act of Congress to his assignor for extra services. The court granted a perpetual injunction as prayed, which was sustained by the Supreme Court on appeal. The jurisdiction

of the court could only have been based upon the idea that the money was within the jurisdiction of the court at the seat of Government, for there was no special statute conferring jurisdiction, and the defendants, except the Secretary, were residents of Pennsylvania.

The circumstances of the case of *Kinney vs. Meguire*, recently decided by the Equity Court, were very much like those of the present case. Several drafts had been issued by the Treasurer, under a private act of Congress, payable to the order of sundry sailors who had been impressed by Admiral Porter for service in the Red river during the war, and were captured and retained as prisoners until the close of hostilities. These drafts were delivered to Meguire, who had been, and claimed to be still, their attorney. He was a resident of Ohio, and left the jurisdiction with the drafts in his possession. Kinney, who exhibited properly authenticated powers of attorney since the issue of the warrants, applied to the Treasurer for the issue of other drafts, and the bill was filed to procure an injunction to forbid Meguire from asserting title under the drafts in his possession. Meguire never answered, but there had been publication against him under Sec. 787 Rev. Stats. D. C., which allows that as a substitute for personal service "in all actions at law or in equity which have for their immediate object the enforcement or establishment of any lawful right, claim or demand to or against any real or personal property *within the jurisdiction of the court.*" And the Equity Court decreed according to the prayer of the bill, after full argument, upon the ground that the money belonging to the claimants, to pay which these drafts had been issued, was in the Treasury at Washington, and therefore within the jurisdiction of the court. It was understood that other drafts would be issued by the Treasurer if the court should decide against the legal right of Meguire to retain those already issued.

It seems plain, then, that when the Orphans' Court considered the funds claimed in this proceeding as localized so as to be proper subjects of jurisdiction here, it was but acting in accord with the established practice of the other branches of the court.

During the existence of the act of June 24, 1812, it was unnecessary and useless to take cognizance of such funds as local assets here, but this was because, and only because, of the existence of that statute.

The learned justice, in the opinion in *Vaughan vs. Northup*, in combatting the idea that the personal representative of a non-resident of the Government should take out letters within the District of Columbia before he could receive the claim, declares, "such a doctrine has never yet been sanctioned by any practice of the Government."

With due submission to the distinguished jurist, I venture the statement that the facts disclosed by our records do not bear out the assertion that it has not been the practice of the Government to pay claims to local administrators appointed by the Orphans' Court of the District. The records of that tribunal abundantly show that from its origin it exercised the power of granting letters here upon property within the District of Columbia belonging to non-residents, whether that property consisted of claims against the Government, or other "debts due to, or just claims of the deceased."

The dockets of administration very seldom furnish any memoranda indicating whether the deceased was a resident or a non-resident, and thus the number of references suggested in that manner are fewer, in all probability, than the facts would warrant. But the cases where such memoranda occur have been examined, and two hundred and seventeen instances are found from 1801 to 1812 inclusive, where letters were granted on the estates of non-residents; by far the larger number of whom are described as attached to the army or navy, or marine corps.

The first of these cases was in July 22, 1802, where letters were issued on the estate of a sailor late of the U. S. frigate *President*. In the same year letters were granted to the executors of Gen'l Washington on his personal estate in this District. In 1805 administration was granted to Capt. Dan'l Cormick on the personal estates of twenty-nine persons late of the U. S. Marine Corps. It seems almost certain

that the object of this administration was to obtain pay or prize money due by the Government, as was expressed on the docket entries in a later case, "to enable the father of Wm. Rogers to receive from the Government the pay due his dead son."

In 1807 letters were granted on the personal estate of Chancellor Hanson, of Maryland.

The granting of such letters would naturally have been less frequent after the passage of the act of 1812, although it continued in each year from that time to a greater or less extent. Thus from 1813 to 1825 inclusive, letters were granted on the estates of non-residents in one hundred and seventy cases. Selecting another period, I find one hundred and twenty such cases, between 1836 and 1844, inclusive; and selecting still another period, fifty-nine such cases were between 1874 and 1877 inclusive.

The case of Mackey *vs.* Coxe in 18 Howard, already cited, shows that the Treasury officials about 1840, required the agent of the administrator of the deceased to take out letters in the District before they would pay him the money due his intestate. As expressed by Justice McLean in the opinion of the court: "There appears to have been no creditors of the estate of Mackey in the District of Columbia, and letters of administration were obtained here, as necessary under the decision of the Treasury Department." So, in the year 1849, letters of administration were granted to Andrew Wylie upon the estate of Samuel Baldwin, described in the proceedings as a citizen of Pennsylvania, and the administrator thus appointed, collected from the Treasury a considerable sum of money awarded to the estate of the intestate under the treaty with Mexico. There was no pretense that there were other assets here, and this payment was made while the act of 1812 was in force and eight years after the decision in *Vaughan vs. Northup* had been announced.

After the act of 1812, had been repealed the practice was continued, and though such applications were sometimes resisted, upon the authority of *Vaughan vs. Northup*, yet the

court appeared to have no difficulty in granting the letters. A few of the more recent cases may be referred to here.

After the close of the war, the executrix of Horatio Ames, of Connecticut, where she had taken out letters, applied for letters to the Orphans' Court here, alleging that the expected assets consisted of a large claim against the Government for munitions of war furnished the Government. They were issued to her, and in 1871 application was made for their revocation, averring a waste of the moneys received from that source.

The application was granted, the objection appearing to have been made that under the act of 1812, the letters here were useless if not improper.

In 1875, however, after the repeal of that law, an application for letters here was made to the same court, and Nathaniel Wilson was appointed by Justice Olin, and gave bond in the penalty of \$160,000.

In the same year James P. Hamilton was appointed administrator of Benjamin Early, and charged himself in his account of assets with \$3,549.50, being "the amount received from the Treasury Department of the United States for cotton seized and used by the United States Government."

In 1876 letters were granted to Charles D. Pennebacker, upon the estate of one Snyder, of Hardin county, Kentucky; the petition alleging "that Snyder had assets in the District of Columbia consisting of one U. S. Treasury draft, No. 5382, for \$713," which draft was then in the hands of the petitioner as the attorney of the deceased.

And on the same day letters were granted to Pennebacker on the estate of one Branham, of Kentucky, the assets being described as "a claim allowed against the Government."

In 1879, John Campbell applied for letters upon the personal estate of one Springer, of New York, alleging that, as administrator of Springer under letters issued at the place of the domicile, he had brought suit in this District in respect of a claim due the estate; but that the defendant, in his plea, had denied the right of a foreign administrator to maintain the suit, which plea had been sustained by the

General Term ; and he accordingly applied for the ancillary letters for that purpose, and the letters were issued accordingly.

In January, 1880, Allan Rutherford, of North Carolina, applied for and obtained letters upon the personal estate of F. W. Beers, of New York, averring that he was a creditor of the deceased, and that "the only property or personal estate left by the deceased is a Treasury draft, payable to the decedent," and the court issued the letters.

And in March, 1881, Mr. Henkle, a member of this bar, applied for letters of administration upon the personal estate of John P. Sherburne, who, it was charged, resided in San Francisco, and had recently died there, leaving personal estate in the District of Columbia, consisting of a certain claim of about \$1,500 against the United States, then in the Court of Claims. The petitioner averred that he had been the attorney of the claimant and as such was a creditor, and as the Attorney-General was urging the trial of the cases, it was necessary that an administration be granted here, and it was done accordingly.

The case of Gen. Burnside occurs to me as one of the more recent cases. That distinguished and excellent gentleman died in Rhode Island, of which State he was a Senator in Congress. His administrators there applied for letters here in respect of his personal assets here, and passed their accounts here as required by law.

In 1876 a large number of letters were granted to Mr. Lowndes, upon the estates of Hawaiian sailors who had claims before the Alabama Claims Commission, and similar letters were recently granted to the same gentleman in seventy-six similar cases, where there had been administration in the place of their domicile ; but it was represented to the Orphans' Court that the rules of the Alabama Commission required that letters of administration should be taken out before the claims could be considered.

In fact, if the practice of a tribunal and its frequent claim of jurisdiction can be regarded in any case as proof to show the rightfulness of the claim, the consistent practice

of the Orphan's Court of the District of Columbia in this particular cannot fail to have great weight in support of the jurisdiction claimed.

I am unwilling to concede that this constant practice of our predecessors and of ourselves is unwarranted, and that the government officials have also been hitherto acting upon a similar incorrect construction of the law. On the contrary, I believe that since the repeal of the act of 1812, the jurisdiction of the Orphan's Court of the District of Columbia to issue letters of administration, whether the property alleged to belong to the non-resident deceased consists of ordinary personal effects, or of claims or debts due to the deceased, whether by private individuals or by the Government, is clear, and that it is its duty to grant the letters upon proper application and compliance with the requirements of the law.

We are all of the opinion that the writ should issue, requiring the Treasurer to make payment of the amounts specified in the three drafts, to the petitioner as administrator of John J. and of John N. Pulliam.

We cannot regard the decree of the Equity Court referred to in the petition, as effective at all against the administrator in Tennessee, since he is not amenable to suit as administrator in this jurisdiction.

The reservation in that decree, which requires the District administrator to account fully of the personal estates of his intestates, will allow full opportunity for a contest by those interested, if they believe Keyser's claim is not properly supported by proof.

The several equity causes mentioned in this opinion have been referred to only for the purpose of showing that in those instances funds in the Treasury have been considered as localized here, and only for that purpose. Nor are we to be understood as intending to interfere, in the slightest degree with the wholesome principle, founded alike upon reasons of public policy and convenience, that exempts from attachment funds in the hands of government officials or other public officers.

Mr. Justice Cox, while concurring in the conclusion of the court, said that he dissented from the reasons given therefor, and thereupon read the the following opinion :

The petitioner, Halstead, shows, that on the 17th of June, 1882, the Treasurer issued certain drafts, in pursuance of appropriations made by Congress, in favor of John J. Pulliam, in his own right, and another to him as executor of John N. Pulliam, payable at the Treasury in Washington, and delivered them to the petitioner as his attorney. John J. Pulliam having died, petitioner subsequently obtained from the Orphans' Court of this District letters of administration on the estates of both the Pulliams. He also sets forth that in a certain chancery cause he was directed by decree of this court to indorse these drafts and collect them at the Treasury, and distribute the proceeds in a manner set forth in the decree ; that in pursuance of the decree he indorsed the drafts and demanded payment of them of the Treasurer, which was refused, although the Treasurer has funds in his possession for their payment ; and he asks a mandamus requiring him to pay them to the petitioner.

The Treasurer answers that he is ready to pay to anyone legally authorized to receive the money, but that the domicile of the Pulliams was in Tennessee, and there were no assets of theirs in the District of Columbia, and the Orphans' Court had no jurisdiction to grant letters of administration on their estates, and the letters of the petitioner are void, that even if not void, they conferred no right to assets out of the District of Columbia, and that the debts represented by these drafts have no local *situs* here, but belong to the administrator of the domicile ; that the administrator of the domicile and the respondent were not parties to the decree referred to in the petition, and not bound by it.

I do not deem it necessary to consider the effect of the decree above referred to, but shall confine my examination of the case to the effect of the letters of administration issued to the petitioner and the extent of the authority conferred by them.

I understand the law as to the rights of executors and administrators, with respect to property in different jurisdictions, to be as follows :

An executor or an administrator appointed at the domicile of the deceased is entitled to the personal estate situated everywhere, subject to the rights of local creditors, to be secured by local administration, but he cannot maintain a suit to recover any property outside of the jurisdiction where he receives his letters. If such a suit becomes necessary in order to possess himself of the property, he must either obtain new letters or procure another to take them out in the jurisdiction where the property is. This new administration is called an ancillary administration, and the assets received under it are to be applied to the payment of local creditors, and the residuum, if any, is to be turned over to the administrator of the domicile for distribution under the law of that place. Among the assets which a deceased may leave are debts due him. As Lord Abinger says in *Att'y Gen. vs. Bonevires*, 2 M. & W., 171 ; Story's *Conflict of Laws*, 421, *et seq.* :

“ As to the locality of many descriptions of effects, household and moveable goods for instance, there never could be any dispute. But to prevent conflicting jurisdictions between different ordinaries with respect to choses in action and titles to property, it was established as law, that judgment debts were assets for the purposes of jurisdiction where the judgment is recorded ; leases where the land lies ; specialty debts where the instrument happens to be ; simple contract debts where the debtor resides at the time of the testator's death ; and it was also decided, that as bills of exchange and promissory notes do not alter the nature of the simple contract debts, but are merely evidences of title, the debts due on these instruments were assets where the debtor lived, and not where the instrument was found. In truth, with respect to similar contract debts, the only act of administration that could be performed by the ordinary would be to recover or receive payment of the debt, and that would be done by him within whose jurisdiction the

debtor happened to be. These distinctions being well established, it seems to follow that no ordinary in England could perform any act of administration in his diocese with respect to debts due from persons resident abroad," &c.

It would follow that, at common law, no executor or administrator of a person domiciled and dying in one of the States could, in virtue of the letters obtained there, recover a simple contract debt due to the deceased from a resident of the District of Columbia. That could only be effected by taking out letters anew here.

This was changed by an act of June 24, 1812, which provided that such executors or administrators might maintain any suit or action, and prosecute and recover any claim in the District of Columbia, in the same manner as if their letters had been granted by the proper authority in said District. But this act was repealed by being omitted from the revision of 1874, and the law stands the same as it was before the act passed.

If an administrator appointed in a State should come within this District and, without taking out new letters here, should, in fact, collect a debt due here which the debtor voluntarily pays him, "it would seem, on general principles," says Judge Story (Conflict of Laws, p. 424), "he would be liable as an executor *de son tort*, or person intermeddling with such assets without rightful authority derived from the local authorities under a new grant of administration here, and might be sued by creditors here."

And suppose further, that after such payment, administration should be granted to another person here, would it be any bar to *his* action against the debtor, that the latter had already paid the debt to *another administrator*, who had no right to demand it, in virtue of his original administration? And suppose a contest to arise between the original and local administrators in relation to the administration of the debt so received as assets of the deceased, could the *original* retain it against the will of the *local* administrator? Judge Story puts both these questions, and evidently thinks that they should both be answered in the negative.

The Supreme Court, however, have since held, in *Wilkins vs. Ellett*, 9 Wall., 741, that a voluntary payment by a debtor to a domiciliary administrator of another jurisdiction is good. And this was re-affirmed in the same case again before the court at the last term.

Subject to the contingency of a claim by a local administrator, undoubtedly, a receipt to a debtor anywhere by the administrator of the domicile would be a discharge, because the domicile is the ultimate destination of all personal assets wherever situated.

The question next presents itself, in what light, as assets, is a debt from the United States to a creditor domiciled and dying in a State to be regarded? I speak now of a general, simple contract indebtedness, not merged in or paid by any special obligation, though it may have been appropriated for. Is it assets at the domicile of the deceased creditor, or is the District of Columbia to be considered the *habitat* of the debtor, so as to make it local assets there?

This question came before the Supreme Court in the case of *Vaughan et al. vs. Northup et al.*, 15 Pet., 1.

James Moody resided in Kentucky and died there; Northup took out administration on his personal effects in that State, and, in virtue of his letters, received from the Treasurer of the United States a large sum of money. The complainants, claiming to be next of kin of James Moody, filed a bill in the District of Columbia against Northup, who happened to be found here, for an account and distribution of the personal estate.

Now, if this debt of the Government stood on the same footing as the debt of a private individual living here, then, on the grounds already referred to, Northup might have been held liable to account for it here as *executor de son tort*. It is true that the act of 1812, then in force, converted all debts due in this District, to a non-resident decedent, into *general*, as distinct from *local* assets, but, as to *Government debts*, the courts held, independently of the statute, that *such* was *their intrinsic character*, in the following language: "But it has been suggested that the present case is distinguishable

because the assets sought to be distributed were not collected in Kentucky, but were received as a debt due from the Government at the Treasury Department at Washington, and, so, constituted local assets within this District. We cannot yield our assent to the correctness of this argument. *The debts due from the Government of the United States have no locality at the seat of Government.* The United States, in their sovereign capacity, have no particular place of domicile, but possess, in contemplation of law, an ubiquity throughout the Union; and the debts due by them are not to be treated like the debts of a private debtor, which constitute local assets in his own domicile. On the contrary, the administrator of a creditor of the Government, duly appointed in the State where he was domiciled at his death, has full authority to receive payment and give a full discharge of the debt due to his intestate in any place where the Government may choose to pay it, whether at the seat of Government or at any other place where the public funds are deposited. If any other doctrine were to be recognized, the consequence would be that before the personal representative of any deceased creditor, belonging to any State in the Union, would be entitled to receive payment of any debt due by the Government, he would be compellable to take out letters of administration in this District for the due administration of such assets. Such a doctrine has never yet been sanctioned by any practice of the Government, and would be full of public as well as private inconvenience. It has not, in our judgment, any just foundation in the principles of law."

This was decided in 1841. In 1855, in the case of *U. S., use of Mackey, vs. Cox*, 18 How., 100, the case was again referred to, and part of the language above cited was repeated with approbation.

In that case the attorney of administrators of Mackey, appointed in the Cherokee Nation, adjusted a claim of Mackey at the Treasury Department. The Department was unwilling to pay him on his power of attorney, and required him to take out letters of administration here, which he did. He received a large sum of money, and then, as attorney for

the administrators of the domicile, receipted to himself as local administrator. On his way home he was accidentally killed and the money lost. The next of kin sued Coxe, one of the sureties on his bond given here. There was no question between the original and local administrators. They were substantially one and the same, *i. e.*, the local administrator was the attorney of the others, and took out letters here for their benefit, in order to get the funds for them. There were no creditors here, and the court held, following the language in *Vaughan vs. Northup*, that the domiciliary administrators could receipt for the money to whoever held it here, and consequently to the local administrator, and in that way discharge his sureties.

I am not aware that the Supreme Court has ever recalled the language employed in *Vaughan vs. Northup*, above cited. And it seems to be fully justified by recognized general principles.

We are accustomed to speak of debts due by the United States as *moneys in the Treasury*. But as far as that might import designated property in a certain place, the expression is incorrect; even a congressional appropriation fails to earmark any specific fund, or confer upon a creditor a lien or property in it. It is nothing more than a recognition of the debt, and an authority to pay it out of the general treasure of the Government.

Nor has the Treasury itself any locality bounded by territorial limits.

The act of August 6, 1846, ch. 90, embodied in General Revised Statutes, Sec. 359, provided that, "the rooms provided in the Treasury building at the seat of Government for the use of the Treasurer of the United States, &c., and the fire-proof vaults and safes erected therein for the keeping of the public moneys in the possession and under the immediate control of the Treasurer, *and such other apartments as are provided as places of deposit of the public money, shall be the Treasury of the United States.*"

It proceeds then to direct that the mints at Carson City and Denver, and the pay office at Boise City, shall be places of

deposit for such public moneys as the Secretary of the Treasury may direct ; that there shall be assistant treasurers at ten different cities, including Boston, New York, New Orleans, and San Francisco ; that the rooms assigned to them *shall be appropriated for the safe keeping of the public moneys deposited with them respectively* ; and it makes all public moneys paid into any depository subject to the draft of the Treasurer of the United States, drawn agreeably to appropriations made by law.

It is true that in *Cooke vs. United States*, 91 U. S., 389, the expression is used, "that the rooms provided in the Treasury building at the seat of Government for the use of the Treasurer, are by law the Treasury of the United States." But that had no reference to any such question as the present. The only question in the case was, whether certain Treasury notes purchased by the assistant treasurer at New York were thereby so finally paid and retired that the Secretary of the Treasury could not return them as spurious. And the court argued that the power to retire them was conferred on the Secretary ; that his department is at Washington, in which all claims must be adjusted ; that the retirement of these notes involved the adjustment of a claim, and that cannot be considered as done until the notes are forwarded to Washington and examined, and finally received or rejected. The expression above mentioned was incidentally used in this argument, but had no reference to any such question as the *situs* of a debt of the United States for the purposes of administration.

Territorially, then, the Treasury is co-extensive with the Union, and the Treasurer, who is authorized, by warrant of the Secretary of the Treasury, to pay a debt appropriated for by act of Congress, may pay it out of funds in New York or San Francisco, as well as out of those in his vaults in Washington. It is impossible to say, then, that an appropriation of money gives to the creditor of the United States, a right of property in any particular deposit of coin in the city of Washington, and within the territorial jurisdiction of this court. It does not advance the creditor a

step beyond where he was before as to any rights of property, but leaves the debt of the Government still a mere general obligation to pay a liquidated sum, which, as the Supreme Court says, is not an obligation to pay at the city of Washington, more than at any other place, and is not therefore property having its *situs* at Washington. And, consequently, a domiciliary executor or administrator of a deceased creditor of the Government is not under the necessity of administering here on a claim against the Government, nor has a *local* administrator, appointed here, the exclusive right to demand it of the Government, as property situated necessarily and exclusively here, and which he only could sue for if the Government were suable in our court.

If the converse of this were true certain other serious consequences must follow. If a debt due from the United States constituted local assets here, of a deceased creditor, it must be equally true that during the lifetime of the creditor it is property within the jurisdiction and subject to the process of the court, as completely as a stock of merchandise would be, in the hands of the Treasurer, as bailee of the owner. It would be subject to be attached as the property of non-residents, or by way of execution. It would be a *res* with respect to which non-residents could be brought into court by publication, and which could be acted upon directly by decree of the court. The custodian of the fund would be as much subject to the direct orders and decrees of the court as any private bailee. But this court, I think, has almost uniformly declined to exercise such a jurisdiction.

In 1825 one Vasse filed his bill in the Circuit Court of this District to enjoin certain parties from receiving and *the Treasurer of the United States from paying to them*, the amount of an award made by a board of commissioners appointed under a treaty with Spain. The real defendants were non-residents, and publication was made against them. The court said: "The first question is, has this court jurisdiction as to any of the defendants against whom it can make a final decree? The fund out of which the claims are

to be paid is in the Treasury of the United States; where is that? The Treasurer resides at Washington, and the head of the Department, but is the money there? Can the fund be said to be within the jurisdiction of the court? We think not. The officers of the United States holding the public money, as money of the United States, are not accountable to anybody but the United States, and are not liable at the suit of an individual, on account of having such money in their hands. The defendants, Comegys, Pettit and Mifflin, against whom only an effectual decree can be made, are not within the jurisdiction of the court * * * We think, therefore, that the bill ought to be dismissed."

With some departures from this rule, expressly authorized by statute, and others which I think were inadvertent, I think this opinion has always prevailed in both the old Circuit Court and this court. Certainly, I think I can say, that, within my recollection, it has been the tradition of both courts, that the court would not assume to decree directly against the Secretary or the Treasurer, the disposition of money in the Treasury (so-called), but would simply decree against the parties in interest properly before the court, and that the Treasury Department, while it would not admit the authority of the court directly to dispose of funds under its control, would, nevertheless, so far respect any decision of the court and any decree made by it, *as between and against the parties interested*, as to apply the money in conformity with such decree.

In 1836, in the case of *Ridgway vs. Hayes*, while the Circuit Court refused, on the merits, to enjoin the Secretary of the Treasury from a certain disposition of a Spanish award, Judge Cranch did, indeed, say that the fund in question was placed in the Treasury as a place of deposit only, and the United States were merely *trustees*, and he could not see why the United States, in cases in which they were merely *stakeholders*, should not submit to the decisions of the courts, but in that case it was unnecessary to decide as to the authority of the court to enjoin the payment of money out of the Treasury. This was, of course, mere *obiter*, and applicable to a different class of cases from the present.

In 1837 a bill was filed by Duthill's Adm'r *vs.* Coursault, claiming a portion of a French award, and praying injunctions against its payment to other parties against the Secretary and the Treasurer. These appeared and answered, and raised the question of jurisdiction, but under protest as to this, professed themselves willing, nevertheless, to pay to the parties who shall appear entitled. The opinion of the court does not touch that question, but decides the merits only, and directs a decree to be prepared accordingly. The decree did, in form, direct the Secretary and Treasurer to pay, and this is the only case in which that occurred.

In 1840, one Metz, claiming as assignee in insolvency for Milnor, filed a bill in the circuit court of this District to enjoin Milnor from receiving and the Secretary of the Treasury from paying to him the amount of a claim against the United States, for which Congress had made an appropriation. The preliminary injunction issued, *sub silentio*, as prayed, and in the final decree the injunction was made perpetual, but the court decreed "that Metz be *entitled to receive*, from the Secretary of the Treasury, the sum of money in the said bill sought to be recovered," and seems to have carefully abstained from decreeing *that the Secretary pay the money*. The case went to the Supreme Court, and the statement of the case in the opinion of that court (16 Pet., 225) is, that "Metz filed his bill (in the court below) enjoining Milnor from receiving the money, and had a perpetual injunction," no notice being taken of the injunction against the Secretary. This is the single instance in the history of the court, I think, of a *final injunction* against the Secretary, except where it was authorized by *statute*, and evidently no question was made on the subject, because he had no interest in raising it. But the decree went no further as against him than an injunction, and declined to give active relief.

An act of Congress of 1849, ch. 108, passed to carry into effect the treaty with Mexico, as far as it related to claims of American citizens against Mexico, enacted that where parties claimed title to the awards made by the Mexican

Commission, they might give notice to the Secretary of the Treasury and file their bills in the Circuit Court of this District for injunctions and relief, and "*any injunction thereupon granted by the court shall be respected by the Treasury Department.*" The same provision was extended to awards on claims against Brazil, by act of July 3, 1852, 10 Stat., 11.

Quite a number of suits were instituted under authority of these acts and among them were the cases of *Dey vs. Whitney* and *Clark vs. Clark*, cited by my brother Haguer, in his opinion. But of course, these are not precedents, and furnish no authority, for the assertion of a general authority over money in the control of the Treasury Department—not subjected by express statute to the jurisdiction of this court.

These cases ran along for a number of years and probably while some of them were pending, Lockett *et al.* filed a bill in the Circuit Court to restrain one Pemberton from receiving and Secretary Marcy from paying to him the one-half of a certain award against Great Britain, which they claimed as counsel fees. Although this kind of case had not been provided for by statutes like those above mentioned, the court and counsel both, probably failed to distinguish between them, and here again *sub silentio*, a preliminary injunction went against the Secretary, as well as Pemberton. But no process was served upon the Secretary and the final decree was not against him at all. It was simply, that *Pemberton pay to the complainant* the money claimed. *Pemberton appealed* from this decree and it was reversed on the merits, but of course no question could come before the Supreme Court in reference to the Secretary of the Treasury. See *Pemberton vs. Lockett et al.*, 21 How., 257.

Thus, it will be seen that there is no instance of a final decree being made against the Secretary of the Treasury respecting the disposition of a fund under his control, except in the case of *Duthill vs. Coursault*, in which the Secretary while reserving the question of jurisdiction, yet virtually submitted to such decision as the court might make; and in the cases above referred to, not arising under the Mexican

and Brazilian award, the decrees were against only the parties in interest who were present in the court, defending, thus giving the court jurisdiction over these persons.

In the late case of *McManus vs. Standish*, decided in 1881, reported in 1 Mackey, Judge Wylie, in reviewing this whole subject, declined to go further than to say that the practice of the court has been in favor of the jurisdiction of this court *where it had the parties before it* to decree as to them. It was a case of claim by counsel to part of a Mexican award made under a later treaty than the former one—that of 1868. The Secretary of State who had control of the funds was made a formal party but did not appear, nor did the court proceed to make any decree against him, although this was not a case of indebtedness of the United States, but the Secretary was a mere stakeholder. All parties in interest were present in court and the decree was made between them.

In a still later case, not reported, relating to one of these same Mexican awards, although it was not money of the United States, where the parties were non-residents, the court expressly declined to take jurisdiction, which they might have done if the theory were correct that such moneys were property within the local jurisdiction of the court. We must hold, then, that a mere government indebtedness has no local *situs* here, simply because this is the seat of Government. What is the consequence?

The Supreme Court says, in *Wilkins vs. Ellet*, *supra*, that “the original administrator, therefore, with letters taken out at the place of the domicile, is invested with the title to all the personal property of the deceased, for the purpose of collecting the effects of the estate, paying the debts, and making distribution of the residue, &c. It is true, if any portion of the estate is situated in another country, he cannot recover possession by suit without taking out letters of administration from the proper tribunal in that country, as the original letters can confer upon him no extra-territorial authority. The difficulty does not lie in any defect of title to the possession, but in a limitation or qualification of the

general principles in respect to personal property by the comity of nations, founded upon the policy of the foreign country to protect its home creditors, &c."

Ultimately, it is admitted on all hands, that the administrator of the domicile is entitled to all debts due the deceased. The only question is whether they may or must not first be administered in the jurisdiction where the debtors are and the debts are due and where they are considered local assets. But as the only ground for appointing a local or ancillary administrator is, that there are assets situated exclusively within the local jurisdiction, which could not be sued for and collected by a foreign administrator, but only by a local one, and since that cannot apply to a debt due from the United States, which is not situated exclusively within this District, and which the administrator of the domicile "might clearly sue for *anywhere*, if the United States were suable generally, it follows that as between the local and domiciliary administrator, the latter would be entitled to the fund.

I am confronted, however, with a long standing practice apparently in conflict with this view.

There are many instances in which our Orphans' Court has issued letters of administration, expressly to enable parties to represent claims against the United States or against foreign governments, before boards of commissioners. It has not only been acquiesced in, but sometimes required by the Treasury Department, as in the Mackey case, *supra*. It has never been done, I imagine, where any question arose as to conflicting claims of non-resident administrators, but it has been done as a matter of convenience, where the domicile was unknown or distant or abroad. Now it is suggested that if the views before stated are correct, it would follow that all these administrations were void for want of jurisdiction in the court.

Although the practice of the Orphans' Court, with the concurrence of the Treasury officers, could not authoritatively settle the question of law under discussion, it would still be matter of regret that it should be necessary to declare the

practice in question wholly illegal. But this does not seem to be necessary.

And this leads me to consider a qualification of the general principle I have laid down, which I think may be fairly admitted, which is, in substance, that an indebtedness by the United States may or may not be local assets here, at the election of the Government. It is the privilege of the debtor, and not of the creditor, or his representatives, to determine the question. The debt is not necessarily or conclusively such assets, so as to give to the local administrator a right to enforce its payment, but if the Government elects to make it such, it becomes assets which our Orphans' Court can take jurisdiction over and administer.

There is no statutory restriction upon the officers of the Treasury as to the place of payment of the public debts. It is fair to hold that they are at liberty to act upon considerations of public convenience, which are paramount to mere private convenience. While it is true that the United States is not exclusively in the District of Columbia, or its debt due exclusively there, it is also true that it is as much there as in the domicile of the creditor. And what is to prevent the Government from electing to pay its debt in the District only, and from considering the seat of Government as its *habitat* for that purpose. Practically, it will be seen, that nothing can prevent this. The administrator of the domicile would not be recognized here. He could not institute a proceeding like the present. He could not obtain a mandamus in any State. No State court would have jurisdiction to grant it. And no court of the United States except this has power to grant a mandamus, except when necessary to the exercise of other jurisdiction. If the Treasurer, therefore, chooses to recognize a local administrator in this District as a proper party to receive payment of a government debt, it seems to be within his power to do so.

In the case of *Wilkins vs. Ellett*, decided at the last term of the Supreme Court, it was held that where a debt due to a deceased person was voluntarily paid by the debtor at his own domicile in a State in which no administration had been

taken out and in which no creditors or next of kin resided, to an administrator appointed in another State, and the sum paid was inventoried and accounted for by him in that State, the payment was good as against an administrator afterwards appointed in the State in which the payment was made, although this was then found to be the domicile of the deceased.

There is no danger, in the light of this ruling, that the United States could ever be called on again for money voluntarily paid to a local administrator here and fully administered, where at the time there was no foreign administrator to claim, as in the cases before referred to. The payment would be considered a discharge, and, if so, the local administrator must be held to have rightfully received it, and the money to be assets in his hands. It does not, therefore, seem to me that the general views I have expressed threaten the integrity of the administration heretofore granted by the Orphans' Court. Another qualification of the general doctrine is to be noted.

I have spoken, so far, of a mere general indebtedness, the payment of which has been authorized by an appropriation, at the time of the creditor's death. This, we have seen, has no local *situs*. But it is very easy for such a *situs* to be given it by arrangement with the creditor in his lifetime. If, for example, the Treasurer of the United States, when authorized by the Secretary's warrant, to pay the debt, should give his draft upon an assistant Treasurer in New York, and the latter should accept it, it is evident that a change would take place in the character of the debt. In place of an open account, commercial paper—a bill of exchange—has been substituted. Assuming it to be the bill of the Government, it is governed by the same rules as that of an individual. *United States vs. Bank of Metropolis*, 15 Pet. The bill has become payable at a place certain, and the debtor is there. That is the place of the contract, and the bill would be assets there. And the same would seem to be the rule when the Treasurer gives a draft on himself. It may be said that this is a bill of exchange, accepted as soon as drawn, to be paid at his

counter here, just as a bill drawn by a partner on his firm is accepted in the very act of drawing it. More properly, perhaps, it is the promissory note of the Treasurer payable here. Byles on Bills, p. 66.

The original indebtedness at large of the United States to the Pulliams has now been paid off—conditionally—by the drafts described in the proceedings. These are a written contract of the Treasurer, whose official residence is at the seat of Government, to pay so much money *at this place*, and this has been accepted in place of a general indebtedness payable anywhere. The United States is under no obligation to pay these drafts anywhere else than here ; no officer of the United States is authorized to do so and the creditor has no right to demand their payment elsewhere. In virtue of this transaction, the cause of action is here only, and the debtor is here. It is difficult to conceive how a debt can be more effectually localized.

The drafts have an intrinsic value as muniments of title to the money they represent. Without them the money cannot be drawn. The foreign or domiciliary administrator could not recover them from the attorney in whose possession they were. Only a local administrator could do that. Virtually, the attorney has done the only thing which he could be forced to do, viz., he has delivered them to the local administrator who, in this case, happens to be himself. This administrator is the only person who can present them for payment. As the Supreme Court says, in *Wilkins vs. Ellett, supra*: "The administrator, by virtue of his appointment and authority as such, obtains the title in promissory notes or other written evidences of debt held by the intestate at the time of his death and coming to the possession of his administrator, and may sell, transfer and indorse the same," &c. We do not see why his endorsement and delivery of them to the Treasurer would not be a perfect protection to him.

The case then stands as if an administrator appointed here were suing a resident debtor on his promissory note payable here, and the latter were making the defence that

there is an administrator at the domicile of the deceased, which would obviously be no bar to the action.

The official character of the respondent, however, makes it necessary to resort to the writ of mandamus. There are no controverted questions of fact calling for the exercise of judgment and discretion on the part of the Treasurer, but the single issue of law whether the petitioner is the person legally entitled to the money which it is the plain ministerial duty of the Treasurer to pay.

THE UNITED STATES

vs.

HENRY W. HOWGATE, CLARA M. HOUGHTON ET AL.

LAW. No. 23,081.

{ Decided May 7, 1883.

} The CHIEF JUSTICE and Justices HAGNER and COX sitting.

Notwithstanding the act of Congress of April 29, 1878, providing for the recording of deeds, &c., property in the possession of one who has in good faith purchased and paid for it but has failed to record the conveyance, is not liable to attachment in a suit by a creditor against the absconding vendor, when it appears that as between the vendor and vendee the entire equity in the property has passed to the latter; the statute regulating attachment proceedings permits the plaintiff to attach only the property of the defendant, not the property of some one else.

STATEMENT OF THE CASE.

MOTION to quash an attachment.

This suit (an action of assumpsit) was commenced August 24, 1881. With the declaration were filed affidavits to support an attachment. On the same day, the summons having been returned "not to be found," an attachment was issued and executed by the marshal upon certain pieces of real estate alleged to be the property of the defendant. Among other parcels so attached, was lot 203 in a subdivision of square 206. Whereupon Clara M. Houghton filed her petition, supported by affidavits, alleging in substance:

That in the month of March, 1881, she, through her

agent, W. H. Houghton, entered into an agreement with the defendant Howgate, whereby the defendant contracted to sell, and the petitioner agreed and contracted to purchase the said lot ; and that on the making of the said contract, petitioner, through her said agent, paid to the said Howgate one hundred dollars, as earnest money. That the consideration therefor was that a certain piece of property was to be conveyed to Howgate, and the sum of fifteen hundred dollars paid to him in money. That on the fourteenth of April, 1881, in pursuance of this contract, Howgate and his wife executed and acknowledged a deed of the property to the petitioner, she, at the same time, paying to Howgate the further sum of two hundred dollars, and at the same time the deed for the lot given to the said Howgate was executed and acknowledged, and the two deeds left at the office of Messrs. Fitch, Fox & Brown, in this city, in escrow, until the balance of the money was paid by petitioner. That on Saturday, the 8th of August, 1881, petitioner took possession of the property which had been conveyed to her, and on the 18th day of August, 1881, petitioner's agent called at the office of Fitch, Fox & Brown, paid the balance of the money due to Howgate, and demanded and received the deed to the property ; that he was about to proceed with it to the record office to have it recorded, when he was informed by one of the firm that they would send some deeds to the recording office either on that day or the following Monday, and that if the deed to petitioner was left with them they would send it to the recording office ; that, in consequence of said statement the deed to the petitioner was left with said firm, but owing to an oversight was not recorded until the 30th of August, 1881. That on August 24th, 1881, this suit was brought against Howgate, and an attachment was issued and laid on the above-described property so conveyed to this petitioner ; that said attachment is still upon said property, and is a cloud upon petitioner's title, interfering with her use and disposition of the property. That she is advised and believes that said attachment was wrongfully issued against and laid upon her said property.

And she therefore prays :

That she may be made a party defendant to this suit to the extent and for the purpose of protecting and defending her rights to and interest in the said described property, in all proceedings having reference to or involving or affecting the same.

An order having been passed making her a defendant to the suit, a motion was thereafter made and granted quashing the attachment against the said lot 203. Whereupon the plaintiff appealed.

GEORGE B. CORKHILL and RANDOLPH COYLE for plaintiff :

The attachment having been levied August 24th, 1881, should have priority of the deed to Mrs. Houghton, which was not delivered for record until August 30th, 1881, and the relative rights of the parties are not affected by the facts that the deed was dated April 4th, acknowledged April 14th, and delivered by Howgate to Mrs. Houghton August 13th, 1881, and that Mrs. Houghton was in possession of the premises at the time the attachment was laid.

The case is controlled by the act of April 29, 1878 (20 Stats., 40-41), which provides that :

"All deeds * * * entitled to be recorded in the office of the recorder of deeds, shall take effect and be valid, as to creditors and as to subsequent purchasers for valuable consideration without notice, from the time when such deed * * * after having been acknowledged, proved or certified, as the case may be, be delivered to the recorder of deeds for record, and from that time only."

Under this statute this court has recently held in two cases that an unrecorded deed is absolutely void as to creditors without notice. *Bank vs. Hitz*, 1 Mackey, 111; *Nelson vs. Henry*, *ante*, 259.

In the case at bar it is not pretended that the creditor had express notice of the unrecorded deed. The only possible effect that can be claimed for the possession shown is that it raised a presumption of notice to the creditor that the party in possession claimed title ; but even though this be true in

some cases, the possession of the purchaser in this case was not such "open, notorious and exclusive possession" as alone raises a presumption of notice. See *Wade on Notice*, sec. 273, and cases cited.

But it is submitted that the unrecorded deed is absolutely void as to creditors, whether with or without notice.

The words "without notice" relate only to "subsequent purchasers for valuable consideration," and do not qualify the rights of creditors."

Similar statutes have been so construed in the following cases: *Guerrant vs. Anderson*, 4 Randolph, 208; *Gray vs. Mosely*, 2 Munford, 545; *Edwards vs. Brinker*, 9 Dana, 69; *Campbell vs. Mosely*, Litt. Sel. Cas., 358; *King vs. Gray*, 6 B. Mon., 368; *Washington vs. Trousdale*, Mart. & Yerg., 385; *Douglas vs. Morford*, 8 Yerg., 373; *Lillard vs. Ruckers*, 9 Yerg., 64; *Hays vs. McGuire*, 8 Yerg., 91.

HENRY WISE GARNETT for petitioner :

The record shows that in March, 1881, the petitioner entered into a contract with Henry W. Howgate for the purchase of the property involved in this proceeding, and paid \$100 as earnest money; that on April 14th, 1881, Henry W. Howgate executed a deed to the petitioner for the property, and received \$200 more on account; that the said deed was left in escrow with Howgate's agents until the balance of the purchase money was paid; that on the 8th of August, 1881, the petitioner took possession of the property, and on August 13th, 1881, paid the balance of the purchase money to Howgate's agents, and received from them the deed from Howgate to her, which she left with said agents for record, at their suggestion.

On August 13th, 1881, therefore, and from that date this petitioner occupies the position of a purchaser for value who has paid the full consideration of the purchase, and is in possession of the property, holding it adversely to the whole world, and has received a conveyance from the vendor therefor.

On August 24th, 1881, the United States instituted the

above-entitled suit, and issued and levied an attachment on this property, claiming it to be the property of Howgate.

On August 30, 1881, the deed from Howgate to this petitioner was recorded.

It is now claimed on the part of the United States that the attachment in this case having been issued and levied before the recording of this deed, therefore the deed is inoperative and void as against the attachment, and possibly prospective judgment and execution.

The reply to this claim is, first, that it is not well founded in law, and cannot be sustained, the law of attachments being that an attachment can operate only upon the right of the defendant existing when it is made. Drake on Attachments, § 234; Cox vs. Milner, 23 Ill., 476; Savery vs. Brown- ing, 18 Iowa, 246; Reed vs. Ownby, 44 Mo., 204.

A dry legal title or a mere *scintilla juris* cannot be attached. Houston vs. Newland, 7 G. & J., 480.

In the present case Howgate had no right, title, seisin or possession in this property; he had sold it; given a deed for it; and delivered possession of it; and it was held adversely to him as well as all other persons.

Before any judgment is obtained in support of the attachment, the petitioner, who has seisin and possession of the property for full value paid, records the deed to her which had been previously delivered, thus showing the mere paper title to be also hers; the attachment, to operate, must have found some right in Howgate to operate on, but here there was nothing.

In the second place, however, if the claim of the Government that this deed is void and inoperative as to this attachment be admitted, it only goes to the extent of rendering the deed inoperative as to the United States, and leaves the petitioner in the position of a *bona fide* purchaser for value who has fully paid the purchase money, and has received and holds seisin and possession, and holds a deed for the property good as between her and the vendor.

It is clear, and must be admitted by the appellant, that the attachment in this or any other case can create no higher

or stronger lien than a judgment, and, in fact, that it does not create so good a lien, for that creates a lien without a levy, and the attachment only holds the property on which it is levied until a judgment can be obtained, and the property sold under execution.

Now, granting for the sake of argument, the appellants' claim, still their attachment is no lien on this property in this state of facts, nor would their judgment, if obtained, be a lien, nor could it be sold under execution issued on such a judgment.

A judgment is a lien only upon the precise interest the debtor has in the property, and no other, the apparent interest of the debtor can neither extend or restrict the operation of the lien so that it can encumber any greater or less interest than the debtor in fact possesses. Freeman on Judgments, sec. 356.

The lien is confined to actual interest. Freeman on Judgments, sec. 357.

And it is well settled that a judgment lien is subject to every equity against the debtor at the time the judgment was rendered. *Id.*, sec. 363, and *Baker vs. Morton*, 12 Wall., 150.

Where a party has entered into a contract to sell property a subsequent judgment is not a lien. *Moale vs. Buchanan*, 11 G. & J., 314 ; *Hampson vs. Edelin*, 2 H. & J., 64 ; *Richardson vs. Stillinger*, 12 G. & J., 478.

As against the grantor or vendor of land, a judgment is a lien thereon only to the extent of the unpaid purchase money. *Moyer vs. Hunnau*, 18 N. Y., 150 ; *Manly vs. Hunt*, 1 Ohio, 257 ; *Hermann on Executions*, sec. 195.

Lands held adversely to debtor are not subject to execution. *Hermann on Executions*, sec. 143.

The following case is directly in point. In *Cutting vs. Pike*, 21 N. H., 347 (1 Foster), the defendant entered into the land of A under a verbal agreement for purchase. He afterwards paid for the land, and to prevent it from being attached for his debts, instead of a deed, took from A his written contract to convey on demand, and remained in possession. Held—

1st. That in equity the defendant was the owner of the land.

2nd. That possession was in law notice of his equitable estate.

3rd. That a creditor of A, the former owner, could not hold the land against the defendant under the extent of an execution issued on a judgment against A and levied after the defendant had paid for the land, and taken the written agreement to convey.

4th. That the intention to defeat the creditors of the defendant could not be taken advantage of by a creditor of A. See, also, *Scoby vs. Blanchard*, 3 N. H., 170 ; *Hadduck vs. Wilmarth*, 5 N. H., 181.

Again, in the case of *Money vs. Dorsey*, 7 Smedes & Marshall (15 Miss.), it was held that the interest of the vendor in land, who has given a bond for title on payment of the purchase money from the vendee, is not subject to seizure and sale under execution at law, at the suit of a judgment creditor who has obtained his judgment since the date of the title bond, and the payment of such portion of the purchase money.

Where a bond to make title on payment of the purchase money is given, the vendor has a lien on the land for the payment thereof ; and when the vendee has paid the whole or any part thereof, he has a lien on the land for the title, which will prevail against the lien of a judgment creditor of the vendor whose judgment is subsequent to the agreement to convey, and the receipt of the consideration money, but not against a subsequent purchaser for value, without notice.

The extent of the right of a judgment creditor of vendor under these circumstances is to subject the unpaid purchase money in the hands of the vendee to the satisfaction of his judgment.

The lien of a judgment operates only on the interest of the judgment debtor at the date of its rendition, and cannot, therefore, prevail against the prior equitable lien of a vendee from such judgment debtor who has received from

his vendor a bond for title, and paid part of the purchase money, although his bond for title has never been recorded. C. sold S. a lot of land, taking a negotiable promissory note for purchase money, giving S. his bond for title; C. sold note for valuable consideration, without recourse; after transfer of note, held that the land was not subject to the lien of a judgment against C. *McGregor vs. Matthis*, 32 Ga., 414; see, also, *Tompkins vs. Williams*, 19 Ga., 569.

An execution at law cannot be levied under a judgment against the vendor where property has been previously sold and *possession given* with an agreement to give title on payment of money. *Burton vs. Bush*, 32 Ga., 669.

In the case now before the court, *the possession* being delivered to and held by the vendee, and the purchase money fully paid before attachment, it is clear, under the light of the authorities, that nothing was left in the vendor on which a judgment and execution could operate, and necessarily nothing which an attachment could reach, and the action of the court below in quashing the attachment as to this property was correct.

Mr. Chief Justice CARTER delivered the opinion of the court.

It is admitted on the part of the United States that this property was honestly bought and paid for by the defendant, Mrs. Houghton, and that after the purchase she took possession and resided upon the property. The deed of conveyance, however, through some oversight of her agent, was not recorded until the week following the attachment laid upon the property by the plaintiff. It is, therefore, insisted that this neglect to record the deed, affords priority to the attaching creditor, and that the relative rights of the parties are not affected by the fact that the deed was executed, acknowledged and delivered, and possession of the property taken, prior to the levying of the attachment.

In support of this assumption, the plaintiff cites the act of Congress, April 29, 1878, which reads as follows:

"All deeds, deeds of trust, mortgages, conveyances, covenants, agreements, or any other instrument of writing, which by law is entitled to be recorded in the office of the recorder of deeds, shall take effect and be valid as to creditors, and as to subsequent purchasers for valuable consideration without notice, from the time of the receipt of the deed for record."

We do not think that this statute applies to such a case as this. Mrs. Houghton, at the time of the levying of this attachment, and the commencement of suit against the defendant Howgate, had bought this property from him, and paid him for it. And in pursuance of the purchase, had taken possession, and was living upon the property, which latter fact was notice to his creditors and to all the world. She had an equity perfect and complete, therefore, in this property, that could be enforced against Howgate and the court would declare that he had no title to it. The entire equity has passed out of him and is in Mrs. Houghton and the plaintiff is only entitled under the law regulating attachment proceedings to attach and levy upon the property of Howgate and not upon the property of some one else. The attachment is therefore quashed.

Mr. Justice Cox said :

I do not regret the conclusion announced by the court in this case, because of the obvious hardship in depriving this lady of the property after she has paid for it. But I have some difficulty in concurring in the law just announced. I have no doubt, if I sell my real estate, and receive the purchase money for it, I pass all my beneficial interest, and a judgment creditor of mine cannot levy upon it as my property. A number of cases have been cited in support of that position ; but none of them turn upon the effect of statutes, such as we have here. It seems to me, the object of this statute is to meet that very state of things, and protect creditors from appearances of title which are not real. Our statute is very comprehensive. We had first, the old act of assembly, of Maryland, 1766, which declared that no estate

above seven years may pass, except by deed acknowledged and recorded within six months, &c. Then our act of Congress provided that all agreements and instruments of writing, all bonds, &c., should be acknowledged and recorded; and in the act as, now amended, it says that "all deeds, deeds of trust, mortgages, conveyances, covenants, agreements or any other instrument of writing, which, by law, is entitled to be recorded in the office of the Recorder of Deeds, shall take effect and be valid," &c., only from the time the same are recorded. In other words, it substantially enacts, that no instrument of any description or form, shall take effect and be valid as to creditors and subsequent purchasers, for valuable consideration, without notice, except from the time of record.

In a number of cases which were cited in argument, it has been held that under statutes similar to this, an unrecorded deed is postponed to a judgment creditor; and if a judgment creditor could levy upon property which had been conveyed by an unrecorded deed in this way, I take it that a creditor may levy an attachment, because the attachment would give him a lien, and the judgment when recovered would relate back to the date of the attachment and have the same effect as if the judgment had been rendered at the time of the attachment; so that it seems to me the general object of these recording acts, is to enable both creditors and subsequent purchasers for value without notice, to deal with the title as it appears on the record—to treat the appearance as the reality of the title. That may operate with great hardship in some cases, as I admit it would in this case if the law was enforced.

It has been urged in argument, and the view seems to be entertained by the court, that the only effect of this law is to make the deed, the muniment of title, void, but to leave the parties as if no deed were passed to give effect to the verbal negotiation for the sale which preceded the deed. All deeds are supposed to be preceded by a verbal negotiation and contract out of which they grow. But it seems to me that if the mere deed is to be void, as against purchasers and

creditors, and the antecedent negotiation not void, the statute is deprived of all virtue whatever; the object of the statute is defeated. Evidently the object of the statute is, that when a deed is not recorded, the status remains the same as if no agreement existed between the parties.

Some stress was laid on the fact of change of possession as notice to creditors. I do not believe there was any actual notice to judgment creditors before the levy, but there was a change of possession, and we all know that possession is constructive notice to the purchaser of the rights of the party in possession. But I do not think that figures in the question between a creditor and debtor. A purchaser is supposed to inspect the property before he buys it, and if he see it adversely occupied he is put on inquiry. But the creditor does not necessarily see the property at all. He takes it from the land records, and gives it to the marshal with directions to levy on the property, and the marshal goes there and proceeds to levy. He is not supposed to know who is in possession, and if the fact is brought to his notice, it is no notice to the creditor, for the marshal is not his agent, but the agent of the law. Possession is not, therefore, constructive notice to him, in my judgment; and, in fact, under our statute, that question does not figure at all as respects creditors. In six cases quoted in the argument it has been explicitly decided that the question of notice is immaterial; that the creditor may levy upon any property the legal title in which he finds in his debtor, although he may know there has been an equitable transfer of it. These are the reasons why I find it difficult to concur in the conclusions of the court, while I am very glad that the court has reached that conclusion in this particular case.

Mr. Justice HAGNER said :

I agree that this question does involve, in one view, very great difficulties; but I am clearly of the opinion that the judgment announced by the Chief Justice is correct. It seems to me, the strength of the defendant's position lies in the peculiar character of the proceedings in attachment. Ordinarily when a man institutes a suit against another, it

matters not how meritorious his case may be, as long as the suit is being litigated he cannot put his hand on a single dollars' worth of the defendant's property. But if an exceptional condition of things is brought to the attention of the court, as, for instance, that the defendant is making away with his property, or has absconded, or done any of the things named in the statute providing for attachment, then this common law immunity is destroyed, and the officer of the law, on proper affidavit made by the creditor, and proper bond to indemnify *the defendant* from any harm he may sustain by reason of the attachment, can seize the defendant's property and hold it until the judgment is rendered. But suppose the marshal, in levying the attachment, takes the property of another person who owes the plaintiff nothing. Because the defendant once owned the property, and still continues to hold the legal title, should the present owner be taken through the courts, and be subjected to all this litigation, and his property in the meantime be held under the attachment, to await the inquiry whether the defendant owes money to the plaintiff? It seems to me the court ought to intervene in a case involving such hardship; for there is no indemnity secured to the real owner of the property for the inconvenience and loss sustained in holding his property during a litigation which may last for years. The bond is to protect the *defendant* in the suit, and not a stranger whose property has been wrongfully attached. After the purchase money had been fully paid, Howgate could have no interest in the land attached, except the dry legal title, a *scintilla juris*, which he would have held in trust for the purchaser. And such an interest not being a beneficial one, in my opinion was not the subject of an attachment. Such was the decision in *Newland vs. Houston*, 7 Gill & John., 480. In that case a resident of Delaware had sold his lands in Maryland, received part of the purchase money, and given the vendee a bond of conveyance. An attachment was laid upon the lands as the property of the vendor, in whose name the record title still stood. The court held that this was but a dry legal title in the defendant; that it was not the inten-

tion of the law to ignore the rights of the real owner of the property ; and that the statute allowed an attachment to be levied only on the property of the *defendant*, and not on the property of others. And they held that it was not such a case as came within the attachment laws.

These are my reasons for concurring in the conclusion of the court, which I believe is by no means at variance with the previous decisions of this court.

S. E. MIDDLETON

vs.

GEO. B. McCARTEE, WM. McMURTRIE ET AL.

LAW. No. 22,171.

{ Decided May 7, 1868.

{ The CHIEF JUSTICE and Justices HAGNER and COX sitting.

Where by a resolution of a stock company a promissory note is issued to pay an indebtedness of the company, the note being signed by the treasurer and endorsed by the directors as such, and afterwards the paper is taken up by one of them, this is nothing more than an advancement by him in behalf of his co-obligors, and entitles him to a contribution for the money thus advanced; he cannot pick out one of the endorsers and charge him with the whole liability, as in the case of an ordinary endorsement.

STATEMENT OF THE CASE.

MOTION for new trial on exceptions.

The plaintiff declared upon the following paper made by the secretary and treasurer of the Ellis Gold Mining and Reduction Company, to the order of Geo. B. McCartee, and endorsed by him, to Wm. McMurtrie, C. H. Parsons and others in the order named, to the plaintiff, the plaintiff being the last endorser and holder :

“\$2,200.

WASHINGTON, D. C., July 21, 1877.

“Thirty days after date, the Ellis Gold Mining and Reduction Company promise to pay to Geo. B. McCartee, or

order, twenty-two hundred dollars, value received, with interest until paid, at the rate of eight (8) per cent. per annum, payable at the National Metropolitan Bank.

“S. E. MIDDLETON, *Treasurer*,

“A. U. WYMAN, *Secretary*,

“*Ellis Gold Mining and Reduction Company.*”

To the declaration were added the common counts.

The defendant, McMurtrie, pleaded as follows :

1. That the note on which the suit was brought was a company note, signed by the secretary and treasurer officially, and endorsed by him (the defendant), he being the vice-president of the company, all in pursuance of a resolution of said company.

2. That he, the defendant, McMurtrie, was merely an accommodation endorser, and received no personal benefit or profit from the transaction.

3. That the plaintiff, Middleton, was one of the persons constituting the said company, and, therefore, in effect, both plaintiff and defendant.

4. That he, the said McMurtrie, endorsed the note in suit at the special instance and request of the plaintiff, Middleton ; that upon first being requested to endorse the said note by Middleton, he objected and refused, but after being assured by the plaintiff that he should and would not be held responsible on the note or for it, and that his signature was simply wanted because the bank where the note was negotiated wanted the names of all the officers of the company, and that the defendant's name was necessary, he being the vice-president of the company ; and that his (McMurtrie's) endorsement of the note was solely and exclusively made upon this promise of the plaintiff, Middleton.

Issue being joined on these pleas, and the case coming on for trial, the plaintiff gave in evidence the note endorsed in the order stated.

The execution of the note, the protest, and notice of protest to the defendant were admitted.

The defendant then, in support of his pleas, and for the

purpose of showing, as he contended, "the true relations between the plaintiff and defendant, and to show the true purpose and proper liability of the immediate parties and original signers," made the following offers of proof, each of which were successively rejected by the court :

1. To prove by the record of the official action of the board of directors of the Ellis Gold Mining and Reduction Company, that at a meeting of the directors, on the 1st of April, 1876, the plaintiff and defendant, McMurtrie, both being present, the following resolution was adopted, authorizing the making of the note in question.

"Resolved, That the secretary and treasurer be authorized to make two promissory notes on behalf of the company—one for \$2,000, payable in three months, and one for \$2,000, payable in four months, with interest at not exceeding 10 per cent. per annum—said notes to be endorsed by the board of directors and negotiated, and the proceeds applied to the payment of the debt of the company, and that payment of the notes shall be made from the first revenues accruing to the company from any source whatever."

2. To prove by the said records of the company, that at a certain other meeting of the board of directors of the company, February 24, 1876, a certain other note was authorized to be made and negotiated on behalf of the company, whereby it was resolved to borrow one thousand dollars at sixty or ninety days, by giving a corporate note, to be endorsed by two of the directors individually.

3. To prove by the same record book that the note in suit was a renewal, by authority of the said board of directors, by resolution dated April 27, 1877, of the note as originally authorized by the resolution of April 1, 1876.

4. To prove that at the time of the endorsement of the note by the defendant, McMurtrie, the plaintiff promised and agreed to and with the defendant, that if he would endorse the note that he should not be held personally liable on it ; that his (McMurtrie's) signature was wanted simply because he was one of the board of directors and vice-presi-

dent of the company, and that he endorsed the note in consideration of the plaintiff's promise, and because he was a director and officer of the company.

5. To prove that the plaintiff and defendant were both stockholders or partners in the said company, as well as directors, at the time of the resolution authorizing the original making and renewal of the note in suit, and were both present at the meeting of the board of directors when the said resolutions were considered and passed upon.

6. To prove that as between the plaintiff and the defendant there was no consideration for the said endorsement from the plaintiff to the defendant, McMurtrie, or to any other person at the defendant's instance or request, and that the endorsement was simply an accommodation one, as above recited.

7. To prove that at the time the defendant signed the said note as an endorser, all of the signatures of the other endorsers were already on the note, and a place left for the defendant's name between the names of McCartee, president, and Wyman, secretary of the said company.

Each of these offers being rejected and exceptions taken, the court, the case being closed, instructed the jury that the plaintiff was entitled to recover, and that they should find for him the full amount of the face value of the note in suit, with interest according to its terms. A verdict and judgment having been accordingly entered in favor of the plaintiff, the defendant, McMurtrie, moved this court for a new trial on the exceptions taken.

LINDEN KENT for plaintiff:

It is submitted that no one of the pleas constitute any defence to the action.

The first, merely in different language, reasserts the allegations of the declaration that the note was that of the company and was executed in accordance with authority especially given.

The second, that the defendant, McMurtrie, was an accommodation endorser, and not liable. The answer is, that

accommodation endorsers are liable unless the circumstances bring them within some rule of exemption, which this plea does not attempt to do.

As to the third plea, that the plaintiff, Middleton, was one of the persons constituting the said company, and therefore, in effect, both plaintiff and defendant, no comment need be made. *Twin Lick Oil Company vs. Marbury*, 1 Otto, 587.

The fourth plea undertakes (but imperfectly) to set up a verbal agreement contemporaneous between McMurtrie and Middleton, which would not only vary the terms of the instrument, but makes it absolutely null and void as to the defendant McMurtrie.

The doctrine on this subject, especially as applicable to negotiable paper, and as between the immediate parties thereto, is so well settled by the Supreme Court of the United States, that we rest it with a reference to the following cases: *Goodman vs. Simonds*, 20 How., 343; *Brown vs. Wiley*, 20 How., 443; *McDonald vs. Magruder*, 3 Peters, 474; *Forsythe vs. Kimball*, 91 U. S., 291; *Bank U. S. vs. Dunn*, 6 Peters, 57; *Thompson vs. Insurance Co.*, 104 U. S., 252; *Martin vs. Cole*, 104 U. S., 30.

In *Specht vs. Steward*, 16 Wallace, 564, Mr. Justice Swayne, delivering the opinion of the court, quotes from *Parsons on Notes and Bills*, 507, "that it is a firmly settled principle that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making, or endorsing of a bill or note, cannot be permitted to vary, qualify, or contradict, to add to or subtract from the absolute terms of the written contract;" and Mr. Justice Mathews, in the case of *Martin vs. Cole*, *supra*, quoting this, says, that "the question, as it arises in this case, cannot now be considered an open one in this court."

Under these authorities, the evidence offered was inadmissible in any view, but if the circumstances justified it, in no aspect could it have been admitted under the pleadings in this suit.

J. W. DOUGLASS for defendant :

1. The defendant offered to prove that, "at the time of the endorsement of the note by the defendant, McMurtrie, the plaintiff promised and agreed to and with the defendant, that if he would endorse the note, he should not be held personally liable on it; that his (McMurtrie's) signature was wanted simply because he was one of the board of directors and vice-president of the company, and that he endorsed the note in consideration of the plaintiff's promise and because he was a director and officer of the company." This evidence should have been heard under the familiar principle that "any facts constituting fraud or misrepresentation, may be set up as a defence to a note, the burden of proof being on the party alleging it." And that this principle has uninterrupted play between the immediate parties to a note. Chitty on Bills, 70; Byles on Bills, 248 (150); Parson's Mer. Law, 124; Kerr on Frauds and Mis., 91-99; 21 Pick., 195; 1 Conn., 329; Abbott's U. S. Dig., 1st Series, 868; 1 Daniel on Neg. Inst., sec. 710; 22 Wis., 21.

2. The defendant offered to prove by the official record of the board of directors, that the note was a company note, for the company's use alone, and was made in pursuance of certain resolutions passed at certain meetings of the board, at which meetings both the plaintiff and defendant were present and taking part as members of the board and officers of the company. The resolutions referred to show beyond doubt, as the note itself does on its face, and by the arrangement of names (endorsers) on its back, that the transaction was corporate and not individual. This, being a simple question of fact, without the slightest admixture of legal controversy, should have been left to the jury to determine. To take it from the jury, as was done, was fatal error.

3. The defendant "further offered to prove that the plaintiff and the defendant were both stockholders or partners in the said company as well as directors at the time of the resolution authorizing the original making and renewal of the note in suit, and were both present at the

meeting of the board of directors when the said resolutions were considered and passed upon." This offer was refused, however, and constitutes another grave error, as it robbed the defendant, when considered in connection with the other offers in the case, of the benefit of that principle of law which holds, that "in no case can a man sue when he is both entitled and liable to contribute, though such liability appear neither on the instrument nor on the record." Byles on Bills, 76 (81) and 157 (130); 6 Pick., 816; 27 Barbour, 552; Parson's Mer. Law, 128; 1 Daniel on Neg. Inst., § 703.

4. The "defendant further offered to prove that as between the plaintiff and the defendant there was no consideration for the said endorsement from the plaintiff to the defendant, McMurtrie, or to any other person at the defendant's instance or request, and that the endorsement was simply an accommodation one, as above recited." This offer was rejected, and the defendant deprived of the benefit of the principle applicable to such cases, that "in the case of an accommodation endorsement there is an implied engagement on the part of the person requesting the accommodation, that he will indemnify the endorser to the extent of the sum payable on the bill." Chitty on Contracts, 438; 1 Greenleaf's Evidence, §284; 2 Greenleaf's Evidence, § 171; 1 Daniel on Neg. Inst., § 679.

5. The "defendant further offered to prove that at the time the defendant signed the said note as an endorser, all of the signatures of the other endorsers were already on the note, and a place left for the defendant's name between the names of McCartee, president, and Wyman, secretary, of the said company." The object of this offer, which was rejected, was to show to the jury that the endorsement by McMurtrie was merely an official act as director and vice-president, and by consequence that he was not individually liable on the note—at least as between him and the immediate parties to the note. The offer was of great importance on this point, when considered in connection with the language of the resolutions authorizing the making of the notes, as it showed

with strong inference that all of the parties to the transaction recognized that the defendant's signature was to be, and was merely official.

6. The bills of exception further show that "the court rejected all of the evidence offered by the defendant to show the true relations between the plaintiff and defendant, and all evidence tending to show the true purpose and proper liability of the immediate parties and original signers of the said note in suit." The defendant claimed at the trial, as he claims now, that as between the immediate parties to a note, the obligation is one of ordinary contract, and not to be tested by those more stringent rules, in the interest of trade, that prevail when the controversy is about the rights of third or innocent parties. As between the immediate parties to a note, as the plaintiff and defendant were in this case, in a most striking and emphatic manner, the following rule, taken from one of the latest and ablest authors on the subject, is the true and just measure of responsibility: "As between the immediate parties, the interpretation ought to be in every case such as will carry their intention into effect, and that their intention may be made out by parol proof of the facts and circumstances which took place at the time of the transaction." 1 Daniel on Neg. Insts., secs. 174 and 740.

Mr. Chief Justice CARTER delivered the opinion of the court.

On the trial of this case an offer was made to show that these parties were directors of the company named in the paper sued on, and that the company being indebted, the directors, at a meeting held by them, at which the plaintiff and defendant McMurtrie were both present, resolved to issue two promissory notes of \$2,000 each, the notes to be endorsed by the directors and negotiated, and that the note in suit was a renewal of one of the notes made by virtue of this authority, and further, that at the time of the endorsement Middleton told the defendant that if he would endorse the note he would not be held personally liable on it, that his (McMurtrie's) signature was wanted simply because he was one of the

board of directors and vice-president of the company, and that he, McMurtrie, endorsed the note in consideration of the plaintiff's promise, and because he was a director and officer of the company.

The question arises, what kind of a paper, as between the parties to it, did these directors get up? Did they make an ordinary piece of commercial paper that left liability to follow in the order of signatures? Or was it the simultaneous and concurrent act of all the parties. It seems to us that this resolution was a part of the written obligation which issued out of it, and that this was a paper concerted in the interest of all the parties. They were all involved in the indebtedness of the company, and they were all desirous of getting rid of that indebtedness, and they were all together when they passed the resolution creating this paper. Now we are asked to change the relative position of the parties to that transaction, and to make one of them the beneficiary of the whole of it, and the remainder of them, or one of them, the bearer of the onus of the obligation which they all united in. Can we do it? Ought we to do it? The plaintiff, Middleton, in common with the other parties to this suit, are obligated to protect the paper and see that it is paid. His act in taking up the common obligation was nothing more than an advancement by him in behalf of his co-obligors, and entitles him to a contribution for the money that he thus advanced, and no more.

There is some difficulty about the pleadings which can be easily remedied on another trial. A recovery could be had, however, under the common counts. This paper is declared on as if it were an ordinary promissory note. The pleas, too, are misconceived—this is not a case of accommodation endorsement. The case is remanded for a new trial, with leave to the parties to amend as they may feel advised.

HORACE STILES vs. FREDERICK SELINGER.

LAW. No. 23,789.

{ Decided May 14, 1883.

{ The CHIEF JUSTICE and Justices HAGNER and COX sitting.

1. An action for goods bargained and sold is not sustained by proof that the goods were pledged and that the pledgee sold them and appropriated the money to his own use.
2. The proper remedy is an action of trover to recover the goods or their value; or assumpsit for money had and received, but in the latter case the pledgor would be entitled only to the amount received for the goods by the pledgee, less the amount advanced with interest thereon.
3. The rights and liabilities of pledgor and pledgee in a case of alleged forfeiture of the pledge incidentally considered.

THE CASE is stated in the opinion.

WM. H. BROWNE and J. J. WILMARTH for plaintiff.

T. F. MILLER for defendant.

Mr. Justice COX delivered the opinion of the court.

This case was submitted to us on briefs. The action was brought in the first instance before a justice of the peace, removed on certiorari to this court, tried at the Special Term and brought here upon a motion for a new trial on exceptions. The facts are, that a gentleman named Stiles, a lawyer, deposited 44 volumes of Wisconsin Reports with Frederick Selinger, a licensed pawnbroker, as security for a loan of \$26, and received from him on the 3d of January, 1882, a pawn ticket for one month, stating that the pledge must be redeemed or the ticket renewed on or before the 3d of February, or the articles pledged would be forfeited. By an act of the legislative assembly, it is provided that, upon default of payment of any debt secured by a pledge in this way, the pawnbroker shall be at liberty, three months from the date of the forfeiture, to sell the property, after having duly advertised it for sale in the two papers of the largest circulation in this District. Therefore the time within which the pledge could be redeemed would expire on the 3d day of May, 1882; but, instead of waiting for that time, the pawnbroker, on the 29th of April, advertised to sell certain forfeited pledges in the form following:

"FOLEY, *Auctioneer*.

"*Auction Sale of Forfeited Pledges.*

"I will sell for F. Selinger, at 737 7th street, n. w., commencing Saturday, April 29, 1882. This sale will consist of ladies' and gents' gold and silver watches, jewelry, clothing, boots, shoes, books, guns, revolvers, plated ware, &c., &c., and will continue evenings at 7 o'clock until every lot has been sold. Persons holding tickets the time on which having expired will please take notice.

"FOLEY, *Auctioneer*.

"F. SELINGER, *Broker*."

The objections made to this by the pledgor are, in the first place, that the advertisement was premature, and that he was not bound to take notice of an advertisement of his property before the expiration of the full time, and in the second place, that the description of the property was not sufficient to put him upon inquiry; and we suppose that both these objections are good. Nevertheless, the sale commenced on the 29th of April and continued until the 8th day of May, when these books, 44 volumes of Wisconsin Reports, valued at \$3 per volume, were put up and bought in by the pawnbroker himself, for the amount of his debt, \$32.50, and a few days afterwards they were sold at private sale by him to another party. At the trial, the counsel for the plaintiff objected to the admission of this advertisement in evidence, because of its insufficiency in the particulars I have already mentioned; and, having been overruled in that objection, he asked the court to give the jury the following instructions:

1. If the jury believe from the evidence that the defendant sold the pledged property without first publishing a notice of the time and place of sale and therein sufficiently describing the property so that it could be identified as "Wisconsin Reports," said sale was a tortious conversion and entitles the plaintiff to recover from the defendant the value of the property, less the amount already advanced, and interest.

2. That the purchase by the pledgee at his own sale, or sale by him to a third person, of the article pledged, at private sale, was a tortious conversion and entitles the pledgor to elect to recover from the pledgee the value of the property pledged, or treat the bailment as continuing.

3. That if, the pledgee purchased at his own sale, and the pledgor elects to treat the bailment as continuing, then a sale of the pledged property to a third person at private sale is a tortious conversion, and entitles the pledgor to recover from the pledgee, the value of the property, less the amount already advanced and interest, and this although no tender had been made of the amount due.

4. If the jury believe from the evidence that, after the property was sold and purchased by the pledgee, he agreed to hold the pledge for the pledgor for a longer time, then the bailment was re-established.

All these propositions of law we think to be correct. The trouble is about their application to this particular form of action. If a man converts personal property to his own use, and he sells it and gets the money for it, the party injured has two remedies, viz., either trover, to recover the full value of the property; or *assumpsit*, for money had and received. But in the latter case he recovers only the amount actually received by the tortfeasor from the sale of the property.

This is an action for debt. It is not an action for money had and received, apparently, but an action upon a debt due for goods sold. The suit was commenced before a justice of the peace upon a bill of particulars in this form :

“MR. FREDERICK SELINGER

To HORACE STILES, Dr.

“To 44 volumes of Wisconsin Law Reports - - - \$130

“Cr. by cash advanced and interest - - - - - 80

Leaving a balance of - - - - - \$100”

So that, to make sense at all out of this, it must be regarded as an action for goods bargained and sold. But the facts in this case do not sustain that action at all. If we can give this any other sort of significance as an action for

debt, it is at best an action of debt for money had and received; that is, for the proceeds of these law reports. In that case the plaintiff would be entitled only to the amount received for them by Selinger, less the amount advanced with interest thereon; and that is exactly what the court allowed him. So that although there may have been error in the ruling of the court below on the propositions of law, the result is right in this form of action. For these reasons the judgment will have to be affirmed, although the law of the counsel for the plaintiff would have been correctly stated if the action had been properly brought.

WASHINGTON MARKET CO. vs. WARTHEN BROS.

AT LAW. No. 19,431.

{ Decided May 14, 1883.

{ The CHIEF JUSTICE and Justices HAGNER and COX sitting.

Pending cross-appeals from a decree settling equities between a market company and certain of its tenants, lessees of stalls, receivers were appointed to collect the rents. There was no provision in the decree appointing the receivers authorizing them to enforce payment of the rents nor directing them to take possession and lease the stall to another in case any tenant should abandon it or otherwise violate the terms of his lease. The tenants failed to prosecute their appeal and one of them, after failing for some time to pay the receivers any rent, abandoned his stall. Whereupon the market company took possession and leased it to another.

Held, that the authority of the receivers extended only to receiving the rents from these particular tenants as they chose to pay, and that on non-payment of the rent, or other violation by the tenant of the terms of his lease, the landlord was entitled to re-enter.

THE CASE is stated in the opinion.

BIRNEY & BIRNEY for plaintiffs.

ELLIOT & ROBINSON for defendants.

Mr. Justice COX delivered the opinion of the court.

This is an action brought by the Washington Market Company against Warthen Brothers, to recover \$408.54 for the rent of stalls occupied by the defendants. In order to explain the defence made in this case, it will be necessary to refer

to the old case of Hoffman and others, instituted in this court, against the same company, growing out of the interpretation put by the butchers upon the terms of their respective leases from that company. The company's charter authorized it to put up these stalls at public auction for one or more years, to the highest bidder, subject to the payment of an annual rent, &c.; and it provided that the person who offered the highest price, at or beyond the minimum, for any stand, should be entitled to the occupation thereof, and should be considered as having the good-will and possession thereof "so long as he chooses to occupy the same for his own business and pay the rents therefor." In pursuance of this, the company did offer the stalls at auction for a term of two years, at a certain fixed rent, and of course the party who offered the highest premium or bonus for a stall, in addition to the rent, received it and took his lease, subject to the terms prescribed as to rent, occupancy, &c. When the first two years expired, the company claimed the right to re-advertise the stalls, and the butchers contested that claim, contending that, having once acquired possession, they had a right to occupy the stalls as long as they pleased without a re-purchase, provided they paid the rent and complied with the other conditions of the leases; and Hoffman and others filed a bill to enjoin the re-sale of the stalls. The company, on the other hand, filed a cross-bill, in which they claimed that the market butchers should be compelled to pay them the rents reserved in these leases. This court decreed, in the first place, that the company should be enjoined from re-selling the stalls; and in the next place, that the butchers should be required to pay the rents. The market company appealed to the Supreme Court of the United States, and that court reversed the decree of this court, and held that there was no perpetual privilege, but only a right to occupy the stalls for a term of two years on certain conditions, and therefore that the company had a right to re-advertise the stalls. Pending the suit, there was an amendment made to the bill, by which others than the original parties were made parties to the suit, and among them the Warthen Brothers;

and when the final decree of this court was made, it was provided in the decree, first, that the company be restrained from offering for sale these stalls, stands, &c., upon any claim or pretense that the several rights and interests of the occupants were for a term of two years only; and, next, that the butchers are, each for himself, severally bound to pay the amounts agreed as rents for the said stalls; and then the decree proceeds: "And whereas the said market company has prayed an appeal to the General Term from such portion of this decree as awards a perpetual injunction against the sale of the said stalls and stands as aforesaid; and the said Hoffman and his co-complainants have prayed an appeal from such portion of this decree as decides that they are liable for rent; and the said several parties have agreed in open court, by their respective solicitors, that, pending such appeal, and any further appeals that may hereafter be taken from the said General Term to the Supreme Court of the United States, receivers should be appointed to collect the rents so decreed to be paid, it is further ordered, adjudged and decreed, that William E. Chandler and Robert K. Elliot be, and they are hereby appointed receivers, to collect such rents from said several defendants to said cross-bill, and the same safely to keep and invest under orders of the court," &c.

Although the butchers did, as recited in the decree, appeal, they did not in fact prosecute the appeal; and inasmuch as the whole object of appointing the receivers was to prevent the rents going into the hands of the market company, upon the ground that they were not entitled to them, there was hardly any necessity for the continuance of the receivers in office. Nevertheless, these two receivers were appointed, and did continue in office and did collect the rents. Then the market company claimed that these defendants, Warthen Bros., failed not only to pay the rents, but also to occupy the stalls, according to the conditions of the leases; and thereupon the company say that, after warning to the defendants, they took quiet possession of the stalls. Subsequently, an order was obtained from the court, at the instance of the receivers themselves, that they be relieved from the collec-

tion of the rents of any "stalls that have been or may be vacated;" and the company, claiming that these stalls had been so vacated, and that the receivers were under no obligation, and had not even the right to collect the rents for stalls vacated, instituted this suit to recover the rents.

The defence is, that the company wrongfully took possession of one of these stalls, and that the damage suffered by the defendants by this proceeding is greater in amount than the rents which the defendants owe, and therefore they seek to recoup these damages against the claim of the plaintiff for rents.

There were five bills of exception presented by the defendants, but the fifth is the only one which is insisted upon.

By that exception it appears that the court said to the jury :

"There is a question as to whether the plaintiff can maintain this action, and whether it had a right to en-enter for non-payment of rent, but I shall hold, for the purposes of this case, as matter of law, that the action can be maintained, and that the plaintiff had the right of any other landlord to re-enter for the non-payment of rent."

In other words, the court held that, notwithstanding the appointment of these receivers, if the stalls of these butchers were forfeited for non-payment of rent, or for non-compliance with any other condition of the lease, the market company had a right to re-enter. The correctness of this instruction turns upon the question whether the appointment of these receivers put it out of the power of the market company to take possession of these stalls under any circumstances. It does not strike us that that was the effect of the decree appointing these receivers. They were not put in possession of the property at all. In case any one of these tenants chose to surrender his lease, it was not provided that the receivers should take possession of the stall and re-lease it to other parties. It was for the market company to do that. The appointment of the receivers referred only to the relations between these particular tenants and the market company. So, if a stall was vacated or abandoned, or not used

according to the requirements of the lease, by any of the tenants, the market company had a right to resume possession of it as forfeited under the lease ; and it does not appear to us that that duty was devolved upon the receivers, or that they had the right under the circumstances. There was no provision in the appointment of the receivers directing them to take possession and enforce any of the conditions of the lease ; and the consequence would have been that no remedy would have existed at all in case of the abandonment of a stall or the non-payment of the rent, unless the company were supposed to remain in possession, with their remedies for a breach of the conditions of the lease. It does not seem to us, therefore, that the object or effect of this order was to pretermitt or suspend the remedies of the market company against defaulting occupants of these stalls. The whole object was to enable the receivers to collect the rents as the parties chose to pay them. It was not until some time afterwards that they were clothed with any power to enforce the collection of rents, and not until after these stalls had become unoccupied. Under the orders then existing, the remedy for a default rested with the company alone ; and this seems to have been the understanding of the parties themselves ; because if the theory contended for in this case, that the appointment of these receivers suspended all power of the market company to take possession, be correct, then this wrong of which complaint is made, could have been redressed in the most summary manner, on application to the court. Yet, they never undertook to seek any relief of that sort, and, in fact, never made a question as to the wrongfulness of this entry by the company until one or two years later, and then by way of recoupment in this case.

We hold, therefore, that on the whole the ruling of the court below as to the power of the market company to deal with these stalls as any other landlord deals with his property, untrammelled by the appointment of these receivers, is correct.

The judgment is therefore affirmed.

HAMILTON A. MOORE, BY NEXT FRIEND, HAMILTON O. MOORE,
vs.

THE METROPOLITAN RAILROAD COMPANY.

LAW. No. 23,789.

{ Decided May 31, 1883.

{ The CHIEF JUSTICE and Justices HAGNER and COX sitting.

1. Even though the evidence for the plaintiff was insufficient to make out a *prima facie* case, this court will not sustain an exception to the refusal of the court below to so instruct the jury, if it appear that the defects of the plaintiff's case were afterwards supplied by the evidence offered by the defendant.
2. A general exception to the granting of prayers is irregular. The party objecting should except specially to the granting of each prayer.
3. So, too, with the charge; the unobjectionable parts should be segregated from that which is objectionable and the latter excepted to specially.
4. If a parent sues for the loss of services of a child by reason of injuries resulting from the defendant's negligence, contributory negligence on the part of the parent is a complete defence; but it is otherwise if the child sues by the parent or any other next friend.
5. What would be contributory negligence in an adult, may not be such in the case of a child of tender years; the caution required is according to the maturity and capacity of the child, and this is to be determined by the circumstances of the case.
6. The question whether the capacity of a child is such that he can be charged with contributory negligence is one of fact which must be determined by the jury.
7. Though the evidence of negligence may be slight, and though it may have affected the court differently from the way in which it affected the jury, the court may not feel at liberty to say that there was not sufficient to go to the jury.
8. The respective obligations of street railway companies, and of persons, (including children) crossing the railway tracks declared in the instructions given to the jury by the court below and approved by this court.

STATEMENT OF THE CASE.

The plaintiff, an infant of about seven years, brought this action by his father, as next friend, against the defendant, a street car company, to recover damages for injuries sustained by reason of being run over by one of the defendant's cars. At the trial, the jury rendered a verdict in favor of the plaintiff for \$5,000, and the case embodying in the record all the testimony, the substance of which is stated in the opinion, came to the General Term on a motion for a new trial on exceptions.

The first exception was to the refusal of the court to in-

struct the jury that upon the whole evidence offered in behalf of the plaintiff the plaintiff was not entitled to recover.

The second and third exceptions were not pressed. The fourth exception, containing the three prayers of the plaintiff, which were granted by the court, was in the form following :

“The plaintiff thereupon prayed the court to instruct the jury as follows :

“1. The law requires of the defendant the exercise of reasonable care and caution in running its cars over and across the streets in this city, in order to avoid injury to persons upon the streets ; and if the defendant, or its agents or servants, by the exercise of reasonable care, could have prevented the injury to the plaintiff, then the plaintiff is entitled to recover, unless you should further find that the plaintiff was himself guilty of negligence contributing to his injury.

“But in considering the question of the plaintiff’s negligence, he is only to be held responsible for the exercise of such judgment, prudence and discretion as is natural to and to be expected from a boy of his age.

“2. If the jury find from the evidence that the defendant, its agents or servants, by the exercise of reasonable and proper care, could have prevented the injury to the plaintiff, then in order to prevent liability, the burden of proof is upon the railroad company to prove that the plaintiff was guilty of failing to use such degree of ordinary care and prudence as would naturally be expected from a boy of his age, which contributed to his injury.

“3. If the jury find for the plaintiff, in estimating the damages, they are to consider the health and condition of the plaintiff before the injury complained of, as compared with his present condition in consequence of said injury, and whether the said injury is in its nature permanent, and how far it is calculated to disable the plaintiff from engaging in those industrial pursuits and employments for which, in the absence of such injury, he would be qualified ; and also the

physical and mental suffering to which he was subjected by reason of said injury, and to allow such damages as in the opinion of the jury will be a fair and just compensation for the injury which the plaintiff has sustained.

"And the court thereupon granted said prayers, and each of them; and to the granting of said prayers, and each of them, the defendant then and there, and before the jury retired, excepted, and prays the court to sign and seal this its fourth bill of exceptions; which is done accordingly, now for then, this 13th day January, A. D. 1883.

"ARTHUR MAC ARTHUR, [SEAL.]

"Justice."

The fifth exception was to the refusal of the court to grant the defendant's fourth prayer which was as follows:

"If the jury find from the testimony that, at the time of the accident described in the declaration, the plaintiff was a child seven years of age, and was allowed by his father, who sues as the next friend of said child, to play in the street in which the defendant's tracks are situated, and the said child ran in the way of car No. 50 in a manner which amounted to negligence, and in consequence thereof received the injury complained of, and that the driver, as soon as he perceived said child, endeavored to stop said car, but was unable to do so in time, and was not negligent in the management of said car, the plaintiff is not entitled to recover."

The sixth exception set out the judge's charge and concluded as follows:

"To which said instruction, and every part thereof, the defendant, by its attorney, then and there, and before the jury retired, excepted, and prays the court to sign and seal this its sixth bill of exceptions; which is done accordingly, now for then," &c.

The charge of the court was as follows:

"The party injured in this case was a child seven years of age, and that is a circumstance which naturally affects the case, because the same degree of judgment, prudence and

caution is not to be expected from so young a person as would be required from an older maturer person. With regard to grown-up persons, they must be free from negligence in order to recover—that is called ‘contributory negligence.’ It is somewhat different in regard to a child. The law adapts itself to the condition and age of the party injured. In this case, if the child was exercising that degree of care that would be expected from one of that age, and was injured by the negligence of the defendant, he is entitled to recover.

“The liability here depends upon the circumstances of the case. I have been asked to instruct you as to the burden of proof. The burden of proof is rather an abstract proposition; but so far as the defendant is concerned, the law imposes upon the company with regard to a child the necessity of exonerating their conduct from negligence, and of showing that the child was guilty of that degree of negligence which will relieve them from responsibility. Now, I have no doubt that if this accident occurred from the negligence of the defendant, or its agent—and when I speak of the defendant I speak of anything that is done by its agents, or suffered by its agents to be done—if the injury occurred through want of proper care and caution, the plaintiff would be entitled to recover, unless the defendant in addition shows that from the circumstances of the case the accident was inevitable, or that the child was not exercising that degree of care for which he was responsible as a child. If the accident was inevitable, the child must bear the burden of it; that is if the proper care and prudence of the plaintiff could have prevented its occurrence, then the plaintiff would be responsible. So that, so far as the burden of proof is concerned, you will consider all the circumstances of the case, and if, upon the whole testimony, it appears to you satisfactorily that within the rules I have just laid down the defendant, or the company, has successfully sustained their part of the issue, they are entitled to your verdict.

“There are one or two particular features in the case to which my attention is called, and your attention is called by

the instructions. I have stated, I think, fully the grounds upon which I think the plaintiff is entitled to recover, and the principles of law which he has claimed should be given to the jury in his written instructions. The defendant, however, requests me to state to you as matter of law, that if this child ran upon the track in such a sudden manner that by the exercise of proper caution and care there was not time to stop the cars or the horse, the company is not responsible. That is undoubtedly true, and I do not understand that principle to be controverted on the other side.

“The other point to which particular attention is directed is, if the boy was running after the car which was going north, and was in the act of stepping upon the rear platform, when he instantly abandoned it and got out upon the track before there was time to stop the car which was going in the opposite direction, that would be a complete defence here. And I think it would. Now, while a child is to be held responsible only for such care and caution as is suitable to its age, an act of that kind is a mischievous one; and while children are exempt from the responsibility of a grown-up person, they are still responsible for mischievous conduct; and if a child does an act of that kind, and in doing so, without the fault of the other side, receives an injury, it is an injury which the child incurs under circumstances which render the other party harmless so far as an action at law is concerned.

“Now, something has been said about these children playing on the street. Well, we know that children do play upon the street, and it goes to illustrate the kind of capacity and judgment a child has; and when we see children playing upon the street, therefore, where there is no danger to apprehend, it looks just like an act that a child would do; it looks just like conduct that is common to most of children. When a railroad is running through one of the public thoroughfares of the city, it is the duty of parents to look after their children, and for their own sake to keep them as much as possible away from a playground upon the railroad; and the parent who neglects this duty incurs sometimes a fearful re-

sponsibility and exposes his own child to very great risks. Still, a railroad that runs through the public streets of the city has not the exclusive right to their occupancy and use. They have only the use of the street for the purposes of their road, and all the other citizens, including men, women and children, have a perfect right to use the street. They are required, however, to exercise such care and caution as will protect themselves from the use of the street by machinery of this description, and they are not to run under the horses' feet or under the cars; they are called upon to exercise their sight and hearing and their powers of locomotion, and if they neglect in this respect they take the risk upon themselves; but you will bear in mind the qualification which I have just stated in this connection with regard to children. Therefore, while children are upon the street they are in the exercise to some extent of a legal right, and I would be very loath to lay down the proposition that children may not use the street for playing occasionally. As was stated by one of the counsel, it is very much the only place they have in close cities, although in this city, such are the admirable arrangements—there are large circles and squares almost everywhere—that children can enjoy some freedom; and when they are permitted to roam upon the street they usually romp and become boisterous and acquire habits which perhaps children would be better without; but after considering all these things as matters of social propriety, there is left the broad doctrine that all persons may occupy these streets, subject of course to the exercise of caution, and subject to the other use to which the street is appropriated, and if they do that they are within the protection of the law. If, however, they do not exercise that degree of care which is imposed upon children in the case of an injury, or upon adult persons in the case of an injury, and come to grief, they must bear the consequences.

“Now, I think that I will give you just what I have been saying to you on this topic in the place of the last instruction which has been asked for on the part of the defendant, and I think this disposes of all that is necessary for the court to say.”

MR. MATTINGLY : "Before you honor leaves that point, I will ask your honor to state the correlative duty of the railroad company using the street. That they have to adapt their use to the habits of children."

THE COURT : "Well, I supposed that was implied. The streets have to be used by citizens, subject to the purposes for which they are occupied by the railroad company, and the railroad company must use it subject to the right of the citizens.

"And this brings us to the question of damages—a question that is left, generally, to the jury, subject to some slight instructions from the court. In this case no vindictive damages are claimed, but simply the actual damage which has been sustained. There is no doubt that this child has suffered a very severe injury, perhaps one that will affect his condition indefinitely, and perhaps, through life. That he must have suffered considerably is quite evident from the nature of the injury. You will consider the case and give him such damages as are proper in view of the circumstances and the injury. You will bear in mind that this is only a horse railway; that it is not one of those gigantic corporations that wheel ponderous mechanisms through our streets, but it is run by power that is quite controllable—by horse power—and that it is so very controllable, is evident from the fact, which does not appear to be disputed in this case, that the car was stopped before it had time to pass the length between the two wheels—almost instantly. And, upon the whole, you are not expected to give damages against this company by way of making an example of them; but you are just to compensate the plaintiff in a reasonable amount. On that subject I simply ask you, gentlemen, to be reasonable in regard to your verdict, because it is only reasonable verdicts, after all, that are satisfactory; and sometimes when they are excessive they not only create dissatisfaction, but embarrassment in the subsequent proceedings in the case.

Mr. WILSON: "Your honor omitted, unintentionally, a qualification: whether or not they are to award any damages depends upon whether or not they find the defendant was guilty of negligence."

THE COURT: "Oh, yes, I imagined that you find in favor of the plaintiff. If you find that the railroad company were not at fault, you will return a verdict for the defendant."

"You may retire, gentlemen."

Mr. WILSON: "I except to the charge and every part of it."

WM. F. MATTINGLY and FRANK T. BROWNING for plaintiff.

NATHANIEL WILSON for defendant.

Mr. Justice Cox delivered the opinion of the court.

This was an action by the plaintiff, an infant of tender years, by his father, as next friend, to recover damages for an injury suffered by being thrown down and run over by a car of the Metropolitan railroad line. At the trial, after the testimony for the plaintiff was closed, counsel for the defence asked the court to instruct the jury to render a verdict for the defendant, on the ground that the evidence did not make out a *prima facie* case of negligence on the part of the defendant company. The instruction was refused, and that is the subject of the first exception. In the course of the trial several other exceptions were taken, one or two to the admission or exclusion of evidence; one to the rejection of a prayer for instructions by defendant; one to the granting of a prayer by the plaintiff for instructions; and, finally, one to the charge; but the only one on which stress was laid in the argument was the first, and that brought before the court simply the question whether the evidence introduced into the case was sufficient to make out a *prima facie* case to go to the jury, and whether the court ought not to have told the jury that there was not sufficient

evidence upon which to find a verdict for the plaintiff. It should be remarked here that, even if the evidence for the plaintiff is, of itself, insufficient to make out a *prima facie* case, yet if any defect in it is supplied by the evidence offered afterwards by the defendant, the plaintiff is entitled to the benefit of that, and the error of the court, if there was error, in refusing an instruction such as was asked in this case, would thus be cured by the defendant's own act. Therefore, the question can be considered fairly only in the light of all the evidence introduced into the case, and it must appear that the whole of the evidence offered by both sides did not present sufficient facts to make a *prima facie* case to go to the jury, before the decision of the court can be reversed for the refusal to give the instruction prayed. Now, in this case, the evidence on the part of the plaintiff was in substance that on the occasion in question a car, numbered 50, belonging to this defendant, had just turned from Missouri avenue into Four-and-a-half street, to go down towards the Arsenal, and, about halfway down that square, met, coming up, car number 15; that the plaintiff, a child about seven years of age, undertook to cross the track, and did cross, before car No. 50, but, through some accident, struck against the horses of car No. 15, which was coming up, and by that contact or collision with those horses, was thrown between the horse drawing car No. 50 and the front axle of the car; that that wheel passed over his legs, and that the driver arrested the car barely in time to prevent the hind wheels also from going over him. The testimony tended clearly to show that car No. 15, which was running north, was going at a very rapid speed, in order to make up lost time, and that car No. 50 was going slowly, but that the driver was not looking ahead but was conversing with some one in the car, and, consequently, that his face was turned around toward the car. It further appears that as soon as the boy fell and the car ran over him, the driver of car No. 15 exclaimed to the other one: "That's what you get by not looking out."

Perhaps the only facts material to the case contributed by the evidence for the defence (of which facts the plaintiff is

entitled to avail himself) are, that this place had been a sort of a play-ground for boys; that they had been in the habit of jumping on and off the cars, and that on this occasion the two drivers both saw the boys playing in the street. One of the drivers says he saw the boys, but did not know whether they were playing or not.

Now, it is argued on the part of the plaintiff, that the driver of car No. 50 was negligent in not keeping a proper lookout. Further, a witness for the plaintiff testifies that he gave the alarm as soon as he saw the boy fall, and attracted the attention of the driver to the boy, so that the driver at once checked the car and prevented the hind wheels from running over him; from which it is argued that if the driver had been keeping a proper lookout he would have seen the boy in time to prevent even the fore-wheel from running over him. It is claimed also that the driver of car No. 15, coming up, was negligent in travelling at an unusual speed, at a point where he would meet another car, and where there was more than ordinary danger because of the presence of these boys playing, he having full knowledge that they were in the habit of playing there, and that children were present there on this particular occasion. The question is, whether these facts constitute sufficient evidence of negligence on the part of the defendant to go to the jury. Two cases somewhat analogous to this one have been cited. One of them is that of *Railroad Company vs. Gladmon*, 14 Wall., 401. A car was running along Bridge street, while some boys were playing there, and one of them suddenly undertook to cross, and was thrown down and had his knee-pan torn off by the wheel. One witness, Mr. Hill, testified that the driver was not looking forward, but was conversing with some one alongside of him, and that if he had been keeping a proper lookout he could have checked the car in time. It did not seem to have occurred to the court in that case, any more than in this, that there was not sufficient evidence to make out a *prima facie* case. The case went to the jury, and they rendered a verdict for \$9,000. I forget whether it was attempted to have the verdict set aside on the ground of insufficient evidence. At all events it was not done.

Another case cited was that of *R. R. Co. vs. Stout*, 17 Wall., 657. In that case it appeared that the railroad company which was sued (the Sioux City & Pacific Railroad Co.), owned a turn-table which was situated on its own premises entirely, but was unenclosed, and adjacent to two public roads. A little child wandered away from its home, three quarters of a mile distant, strayed into this place, got to playing on the turn-table, and had his foot crushed. The company was sued and certain instructions were asked, but the question really presented was whether there was sufficient evidence from which the jury could infer negligence on the part of the defendant. It appeared from the evidence that children had been in the habit of playing there, and had been several times warned off by the railroad employees. The court said that the mere fact that children *had* played there before was sufficient to give notice to the company that there was danger of their coming there again, and the fact that an injury did actually happen there was sufficient evidence to go to the jury that the condition of the turn-table was dangerous; that these facts constituted notice to the company that the place was dangerous, and that there was a possibility of children being injured there, and that this, with the fact that the child in question *was* injured, was enough to make a case to go to the jury. The court says: "That the turn-table was a dangerous machine, which would be likely to cause injury to children who resorted to it, might fairly be inferred from the injury which actually occurred to the plaintiff. There was the same liability to injury to him, and no greater, that existed with reference to all children. When the jury learned from the evidence that *he* had suffered a serious injury by his foot being caught between the fixed rail of the road-bed and the turning rail of the table, they were justified in believing that there was a probability of the occurrence of such accidents. So, in looking at the remoteness of the machine from inhabited dwellings, when it was proved to the jury that several boys from the hamlet were at play there on this occasion, and that they had been at play upon the turn-table on other occasions, within the observa-

tion and to the knowledge of the employees of the defendant, the jury were justified in believing that children would probably resort to it, and that the defendant should have anticipated that such would be the case."

It may be said in this case, by parity of reasoning, that the fact that children had been in the habit of playing at this identical spot, was a warning to the agents of this defendant, that children might on other occasions be found playing there, as they were on the occasion in question, and that the fact that an injury *did* happen from the meeting of two cars at that point was sufficient evidence that every occasion of the meeting of cars at this point where children were in the habit of playing, was an occasion of danger. In the case of the Railroad Co. *vs.* Stout, the court says: "The evidence is not strong, and the negligence is slight; but we are not able to say that there is not evidence sufficient to justify the verdict. We are not called upon to weigh, to measure, to balance the evidence, or to ascertain how *we* should have decided if acting as jurors." We think we must entertain the same view in reference to this case. Though the evidence of negligence may be slight, and though it might have affected us differently from the way in which it affected the jury, we cannot feel at liberty to say that there was not sufficient evidence to go to the jury. If this had been the case of an adult we should have little difficulty in holding that there was sufficient contributory negligence on his part to defeat a recovery; but we cannot say so in regard to a minor child of tender years. There is hardly any set of circumstances which a court can say, as matter of law, amount to contributory negligence on the part of such a plaintiff as that. It is always finally, a question of fact whether the capacity of the child is such that he can be charged with contributory negligence, and as a question of fact, it must necessarily be submitted to the jury for determination.

There was no argument addressed to the court upon the other exceptions, and it is hardly necessary to discuss them at any length; but one or two of them will be briefly noticed. There were three prayers asked on the part of the

plaintiff, none of which seem to us to be objectionable. The counsel for the defence, apparently as a matter of precaution, excepted generally to the granting of those prayers. The exception itself is not exactly regular, because it does not except specially to the granting of each prayer. However, I do not think it is necessary to notice those further.

The defendant asked four instructions, one of which was refused. The one refused was as follows :

“ If the jury find from the testimony that, at the time of the accident described in the declaration, the plaintiff was a child seven years of age, and was allowed by his father, who sues as the next friend of said child, to play in the street in which the defendant's tracks are situated, and the said child ran in the way of car No. 50 in a manner which amounted to negligence, and in consequence thereof received the injury complained of, and that the driver, as soon as he perceived said child, endeavored to stop said car, but was unable to do so in time, and was not negligent in the management of said car, the plaintiff is not entitled to recover.”

That embodies two propositions. The first is that if the parent of the child was negligent, that negligence is to be charged to the plaintiff, and that that, with other facts, is to be considered by the jury as a defence. Now we do not understand the law to be so. If a parent sues for the loss of services, contributory negligence on the part of the parent is a complete defence ; but if the child sues, by the parent or any other next friend, it is no defence.

The next proposition is decidedly faulty. It puts the question of the child's negligence to the jury, and states that the child's negligence is to be estimated without reference to his capacity. The Supreme Court held in the Gladmon case that the jury must be instructed that the negligence imputable to a child must be estimated with reference to his tender years ; that “ the caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case.” This part of the instruction, omitting that qualification, is therefore faulty, under the ruling of the Supreme Court.

There was a charge by the court, which occupies some four pages of the record, and the counsel for the defence except generally to it in every part. This is faulty in form; because, while there is a portion of the charge that was objected to, there are other portions wholly unobjectionable, and a general exception which does not segregate the objectionable part is faulty in form. But we may say that even the part complained of is correct.

On these grounds, the motion for a new trial on the exceptions will have to be overruled.

WAGGAMAN vs. BARTLETT.

LAW. No. 23,675.

{ Decided February 19, 1883.

{ The CHIEF JUSTICE and Justices HAGNER and COX sitting.

A tenant may contract with his landlord to quit on shorter notice than thirty days, notwithstanding the provisions of the Landlord and Tenant's Act of the Revised Statutes of the District of Columbia.

THE CASE is stated in the opinion.

HUGH T. TAGGART for plaintiff:

In the case at bar the court below ruled, "that it was not competent for the plaintiff to show an agreement with the defendant, under the terms of which the tenancy of the defendant could be determined by the service of a three days' notice to quit, where default should be made in the payment of rent, that such an agreement would be in contravention of the statute, against public policy, and void; that the statute required a notice of thirty days, and that the parties could not contract for a shorter notice."

The right of a landlord to protect himself against an unrequited occupation of his premises by a party who takes possession as a tenant under an agreement to pay rent, is an incident of the *jus disponendi*; in availing himself of it, it is difficult to see wherein he violated any rule of public policy. It would seem to be more consonant with equity and good morals, that the tenant should not be allowed, as in the

present instance, for months to hold the property without rendering compensation.

The ruling above quoted, it is respectfully submitted, is based upon a fundamental misconception of the purport of the sections of the Revised Statutes of the District of Columbia relating to landlord and tenant; obviously, with a single exception, these sections do not affect in any way express contracts; on the contrary, express contracts are expressly excepted from the operation of the act.

The exception referred to is that of tenancies at will arising under the act through express contract; these may be determined like the tenancies by implication provided for in the act by a notice of thirty days.

In the case at bar the plaintiff showed an express contract (that is, a contract of letting which was expressly agreed to by the parties), and the tenancy was determined agreeably to its provisions. He was, therefore, entitled to the benefit of the summary remedy provided for such cases by section 684 of the statutes.

For a clear analysis and exposition of the provisions of the sections of the Revised Statutes relating to landlords and tenants, see article of Mr. Perry in 4 Wash. Law Rep., 220, from which it appears beyond question that they have no reference to express contracts.

Notice to quit is never required where the parties have, by mutual agreement, fixed the terms on which the lease is to terminate; the lessee may waive the right to require notice, and, for the same reason, the right never arises where a lease for years expires by its own limitation, or the parties have otherwise made an end of it. *Conventio vincit legem* Allen vs. Jaquish, 21 Wend., 681.

It follows that a new trial should be awarded.

HINE & THOMAS for defendant:

Bartlett was a monthly tenant. His tenancy had been forfeited by a default in the payment of rent; he was then a tenant at will, and it remained only for Waggaman to turn him out, on a thirty days' notice to quit, as provided in the statute. R. S. D. C., sec. 684.

The object of the statute being to protect the family of the tenant, its provisions therefore, like those provisions of the law relating to exemptions in favor of debtors in this District, cannot be waived. The agreement in this case is entitled to a place in the first rank among those agreements commonly called "cut throat" agreements. All rights are reserved to the landlord, none to the tenant, except to move out in three days, if, perhaps by accident, he should fail to pay his rent. This court, construing the statute relating to the goods of a debtor exempted from execution, has held that the debtor could not waive the statutory provisions in his favor. On the same principle, we submit, the waiver of thirty days' notice to quit in this case is void.

The stipulation of Bartlett that on default in the payment of rent, Waggaman might, on a three days' notice to quit, proceed to put him out, is unreasonable. To give effect to it would be, we submit, to give landlords a remedy in such case more summary than that given by the statute. It is in contravention of the statute. It is against public policy as affecting the relation of landlord and tenant, and void.

The court below was plainly right, and the judgment should be affirmed.

Mr. Justice Cox delivered the opinion of the court.

This was originally a case before a justice of the peace to recover possession of certain premises which, the complainant claimed, were held by Bartlett, the defendant, as tenant under him. At the hearing the defendant appeared and denied that he held the premises as alleged, and alleged title in others under whom he held. Bonds were then entered into by both parties in the usual form, and the case was certified to the court agreeably to the act of Congress. At the trial it was proved on the part of Waggaman that the defendant occupied the premises described in the papers as tenant, and had paid rent to him for some months, and finally was in default for some months; and on the 20th of March he served him with a notice to quit, in writing, within three days, according to the terms of the agreement in

writing between the parties, which was itself offered in evidence. The agreement thus offered purports to be an instrument signed and sealed by the defendant, in which he agrees to hold the premises as tenant, under Waggaman, and pay rent at the rate of one hundred dollars for each month that he shall continue tenant on the premises, there being no term of tenancy specified. That agreement also contains this provision :

“ And it is further provided, as conditions of my tenancy hereunder, that if any month's rent shall not be paid when the same shall be or become due and payable as hereinbefore provided, or if any breach shall be made in any other of the covenants on my part herein contained, then, or at any time thereafter, it shall be lawful for the said Thomas E. Waggaman to terminate this tenancy by a notice to quit in writing of three days, which notice may be served on me in person or by leaving a copy of the same on the said premises ; and upon the expiration of the said notice the said Thomas E. Waggaman shall be entitled to the immediate possession of said premises and my tenancy hereunder shall immediately cease and determine.”

The defendant objected to the admission of this agreement, on the ground that it was signed by only one party. And the court sustained that objection at first. I am unable exactly to comprehend the ground on which the court made this ruling, because any promise which is sustained by a sufficient consideration, I take to be a valid promise, although it is not signed by the promisee also. All promissory notes are of this description. All agreements or memoranda of agreements under the statute of frauds may be signed by one party, and are not necessarily to be signed by more than one party, and I take it that whether an instrument be under seal or not, if sustained by a sufficient consideration it is binding and should be received in evidence though signed only by the party sought to be charged. To pass from this point ; after this ruling the plaintiff offered the instrument in evidence as tending to show what the parol agreement between the plaintiff and the defendant was in regard to the

term of his tenancy, and for that purpose it was admitted. When it was read, the court immediately ruled that it was not competent for the plaintiff to show an agreement with the defendant under the terms of which the tenancy of the defendant could be terminated by a three days' notice to quit when default in payment of rent should be had ; that such an agreement would be in contravention of the statute and against public policy and void ; that the statute required thirty days' notice, and the parties could not contract for a shorter notice, and directed the jury immediately to find a verdict for the defendant. So that the simple question presented here is, whether a landlord and tenant may contract that the tenant shall quit on shorter notice than thirty days.

In order to determine this point it may be well to consider what the state of the law was before the statute passed. Originally, if a man leased his land for a term not certain, it was called a lease at will, and if he held over a certain term, he was a tenant at sufferance. In the course of time, in the interest of agriculture, the courts created a new tenancy out of these, called a tenancy from year to year. In other words, they held that where a man leased land generally, it should be held to be a lease from year to year until terminated by a half year's notice to quit. Where the tenant held over after the expiration of his lease, and where the landlord recognized him as a continuing tenant by receiving the rent, the courts held that to be the same thing—a tenancy from year to year—the principal feature of which tenancy was that it was to be terminated with a notice of half a year to quit ending with the current half year. But it was never understood, and we have found no decision intimating such a thing, that this rule as to notice to quit interfered with any convention between the parties themselves. The rule is stated by Archbold on Landlord and Tenant, page 86, as follows :

“ A notice to quit is required by law, or by local custom, or by express stipulation between the parties. In the latter case the notice must be such as has been agreed upon, whether the same would be required by law or be sufficient if no such

stipulation existed or not," and a number of cases are cited on this point. It continues: "And, therefore, if it be agreed between the parties that the tenant shall quit at a quarter's notice, of course a quarter's notice only is necessary. Where it is required by local custom, the custom will be considered as engrafted upon and forming part of the contract between the parties, and must be complied with. In the absence of express stipulation or local custom upon the subject, if a tenant holds his land or house, &c., from year to year expressly or impliedly, either the landlord or he may determine the tenancy by giving a half year's notice to quit."

That was the condition of the law, then, when this statute was passed; that in the absence of an express stipulation, a general letting, that is a letting having no definite term, could be terminated by notice to quit of one-half year, or any other notice that the parties themselves should agree upon. The letting in this particular case comes within the description of a general letting because no particular time is fixed. The defendant agreed to hold and pay so much rent as long as he should continue tenant of the premises.

Now our landlord and tenant act takes hold of the two very cases which I have mentioned, which would amount to tenancies from year to year at common law. It says, sec. 5:

"All occupation, possession, or holding of any messuage or real estate without express contract or lease"—that is in one case, and "or by such contract or lease the terms of which have expired"—that is, the other case—"shall be deemed and held to be tenancies by sufferance."

The first case is one which I mentioned before, where there is no express contract or lease fixing the term of the tenancy. And the second is where a party holds over by a contract the terms of which have expired. The meaning of that is, that where he has an express lease or contract, and the term has expired, he holds over under the same terms and conditions contained in the lease which has expired. In these two cases the law declares that there shall be a tenancy by sufferance. Then it goes on to provide that all estates at will and sufferance may be terminated by notice to quit of

thirty days, &c. In other words, it says that those cases, which, at common law, would be called estates from year to year, shall hereafter be called by a new term, that is, estates by sufferance, but that whereas in common law they could only be determined, in the absence of express contract, by a half year's notice to quit, thenceforth they may be determined by thirty days' notice to quit. In both cases supposed, there is no express contract as to the notice to quit. Of course if a party holds without any express contract or lease there is no notice required ; or if he holds according to the terms of the lease which has expired, the same thing may be remarked. Because where a definite term is fixed, as in this case, there is never any notice to quit or stipulation for any notice to quit ; and particularly there would not be any stipulation in a definite lease, for notice to quit after the lease had expired and during that time to which it did not apply.

So that both the cases to which this statute applies, and in which it provides that thirty days notice shall be sufficient, are cases where there was no express contract at all as to notice. The statute, therefore, does not provide any rule for the case of an express agreement between the landlord and tenant as to the time of notice to quit. It does not profess to act upon that case at all, and contains nothing which, by necessary implication, interferes with the entire control of the parties over this subject. That being the case, we are unadvised that there is any authority, and we do not see that there is any rule of law, for the proposition that a landlord and tenant may not stipulate between themselves as to the length of notice to quit. It was put upon the ground of public policy in the court below. Well, the same thing may be said of a half-year's notice to quit at common law. That was a rule of public policy in the interest of agriculture, so that the tenant should not be ejected without an opportunity to harvest his crops, &c. Yet that rule does not interfere with the right of the parties to modify the contract by rule among themselves. In argument, it was likened to an exemption law, which not only protects the

property from the creditors, but from a party's own acts. A case was cited from New York, well reasoned, in which it was held that the tenant could not relieve himself of this privilege of exemption ; and it was argued, by parity, that this was a case of that sort ; that the party should not be allowed to bind himself to leave on less than thirty days' notice, and ought not to be allowed to contract himself out of that privilege or exemption. But there is this manifest difference. An exemption law protects a man from the seizure of his own property by his creditors ; it protects his household. In that New York case it was held to protect him from his own contract subjecting his property to the claims of creditors. But no exemption law, or rule of public policy, which we are acquainted with, entitles a man to retain possession of any other man's property. Where a man has a lease for a definite term, that lease is the limit of his interest in that property. Every day beyond that time that he occupies it is an encroachment upon the property of another person, that is, his landlord. So, if a man agrees to vacate property when his landlord shall require it after an agreed notice, or without notice—one day's notice or ten—any occupation of that property beyond the period stipulated, is the occupation of his landlord's property and not his own. We are unable to see why the tenant cannot stipulate to give up another person's property generally, and *a fortiori*, why he cannot stipulate that if he does not pay the rent he will vacate the premises within a given time.

For these reasons we think the ruling of the court is erroneous on this point. That is the only point presented in the bill of exceptions. The plaintiff is entitled to a new trial.

FIFTH BAPTIST CHURCH

vs.

BALTIMORE AND POTOMAC RAILROAD COMPANY

LAW. No. 17,470.

{ Decided June 5, 1883.

{ The CHIEF JUSTICE and Justices HAGNER and Cox sitting.

1. Plaintiff recovered in the Circuit Court of this District a judgment in an action of tort. On appeal to the Supreme Court of the United States the judgment was affirmed with costs and interest, until paid, "at the same rate per annum that similar judgments bear in the courts of the District of Columbia."

Held, That these words are not to be taken as directing an inquiry into the character of the action in which the judgment below was rendered, but merely as indicating that the rate *per centum*, at which the interest must be computed, shall be no higher or lower than the legal rate in the jurisdiction where the judgment was originally recovered.

2. And it *seems*, per Hagner, J., that a judgment founded on tort, recovered in the courts of this District, bears interest from its rendition to its satisfaction.

THE CASE is stated in the opinion.

J. J. DARLINGTON for plaintiff.

ENOCH TOTTEN for defendant.

Mr. Justice HAGNER delivered the opinion of the court.

In June, 1879, the plaintiff recovered a judgment against the defendant in the Circuit Court, in an action of tort, which was affirmed by this court in General Term. An appeal was taken to the Supreme Court of the United States, which, at the October Term, 1882, passed the following order:

"Whereas, in the present term of October, in the year of our Lord one thousand eight hundred and eighty-two, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel. On consideration whereof: It is now here ordered and adjudged by this court, that the judgment of the said Supreme Court, in this cause, be, and the same is hereby affirmed with costs and interest, until paid, at the same rate per annum that similar judgments bear in the courts of the District of Columbia."

Upon the reception of this mandate by the court of the District, the defendant tendered payment of the judgment and costs without interest, but the plaintiff refused to receive

this amount unless the defendant should also pay the interest from the date of the recovery of the judgment in the Circuit Court. The defendant thereupon filed a petition to the General Term, in which it offered to bring into court the amount of the judgment and costs, and prayed that an order should be made entering the judgment satisfied upon the payment of the amount thus tendered.

It is contended upon the part of the defendant : First, that under the language of the mandate, the lower court is required to examine into the nature of the action and ascertain whether it is one in which a plaintiff is entitled to interest from the rendition of the judgment (as *in such cases only* can interest be added, according to the order of the Supreme Court); and, second, that according to the law and practice of the courts of the District of Columbia, interest is not chargeable in an *action of tort* like the present.

In our opinion, the words relied on, "at the same rate per annum that similar judgments bear in the courts of the District of Columbia," are not to be taken as directing an inquiry into the character of the action in which the judgment below was rendered, but merely as indicating that the *rate per centum*, at which the interest must be computed, shall be no higher or lower than the legal rate in the jurisdiction where the judgment was originally recovered.

And this sufficiently appears from the statutes and from the rules of the Supreme Court bearing upon the subject.

Nothing could be more obviously just than that something in the way of penalty or additional costs should be applied, in the discretion of the appellate court, to deter frivolous appeals. Unless such power existed, the losing party would have every motive for an appeal, and none for acquiescing in the judgment below. And this would be especially the case where the judgment grew out of a personal action founded in tort, where, at common law, the death of either party would cause an abatement of the action. Accordingly, at a very early day in England (1486), the statute 3 Henry VII, ch. 10, was passed, in these words :

"Item, That where oftentimes plaintiff or demandant,

plaintiffs or demandants, that have judgment to recover, be delayed of execution, for that the defendant or tenant, defendants or tenants, against whom judgment is given, or other, that been bound by the said judgment, sueth a writ or writs of error to annul and reverse the said judgment, to the intent only to delay execution of the said judgment: It is enacted, &c., * * * that if any such defendant or tenant, defendants or tenants, or any other, that shall be bound by the said judgment, sue, afore execution had, any writ of error to reverse any such judgment, in delaying of execution, that then if the same judgment be affirmed good in the said writ of error, and not erroneous, or that the said writ of error be discontinued in the default of the party, or that any person or persons that sueth writ or writs of error, be noursued in the same, that then the said person or persons, against whom the said writ of error is sued, shall recover his *costs and damages* for his delay and wrongful vexation in the same, by discretion of the justice afore whom the said writ of error is sued."

At common law, no costs were allowable on a writ of error; and as there could be no damages, strictly speaking, on a writ of error, but only a reversal or affirmance of the judgment, it was evident that the expression "costs and damages" was intended to give new penalties not previously existing. The fact that all interest was considered usurious and illegal until the reign following the passage of this act, explains the failure of the courts to carry into effect its provisions by allowing interest by way of damages. The unwillingness of the judges to enforce the recovery of the damages in any form, was very clearly evinced by the passage of a subsequent act, the 19 Henry VII, chap. 20, which recites at length the passage of the former statute, and then proceeds as follows: "Which act or ordinance hath not been as yet duly put in execution, by reason whereof, as well plaintiffs as demandants, in divers actions by them sued sith the making of the said statute, have been oftentimes delayed of their execution, to their great and importable hurt, loss and charges; wherefore, the King, our sovereign lord, by the

advice of the lords spiritual and temporal, and the commons, in this present Parliament assembled, and by authority of the same, ordaineth, establisheth and enacteth, that the said act made the third year of his reign, concerning the premises, be good and effectual, and that from henceforth, it be duly put in execution."

Both of these statutes were in force in Maryland. (Kilty, p. 228-30.)

Mr. Sellon, Vol. II, p. 446, says:

"It is observable that the statute of Henry VII particularly mentions costs *and damages*, clearly showing that the legislature intended something more than the mere costs. And indeed were it otherwise, it might often be advantageous to the party against whom judgment is obtained, to delay execution by writ of error, even upon payment of the costs, inasmuch as if the amount of such judgment were considerable, the very interest of the money, by delay of payment, might exceed the costs in the writ of error; for this reason, therefore, interest from the time of signing the judgment until the affirmance thereof, is now generally allowed and added to the costs by way of damages."

In 1781, in the case of *Zinck vs. Lancton*, Douglass, 749, Lord Mansfield said that the word "damage," in the statute, must mean something different from costs, as both words are used, and he determined that interest on the amount of the judgment ought to be the measure of such damages; and a rule was made absolute that the master should compute interest on the verdict from the day of signing final judgment below down to the time of the taxation of costs on the affirmance of the judgment.

And in *Entwisle vs. Shepherd*, 2d Term Rep., 78, which was an action brought on a judgment recovered in the Common Pleas, decided six years afterwards, Buller, J., said: "Under the statute of Henry VII, it is now settled that the party has to pay interest on the judgment; and provided by the course of the court, interest is not computed in the allowance of costs, the jury would give interest in the name of damages."

This was the state of the law in England when the act of Congress of 1789 was passed, which declared (Sec. 1010 Rev. Stats.), "where, upon a writ of error, judgment is affirmed in the Supreme Court, or a circuit court, the court shall adjudge to the respondent in error just damages for his delay and single or double costs at its discretion."

In execution of this statutory provision, the Supreme Court originally adopted a rule fixing the "damages" in the form of interest at six per cent. except under special circumstances, where the rate was fixed at ten per cent. And in 8 Peters, 481, the court reformed a judgment rendered at a previous term, where the interest had been omitted, so that the judgment should read thus: "It is adjudged and ordered by this court, that the judgment of said Circuit Court in this case be, and the same is hereby, affirmed with costs and damages at the rate of six per centum per annum."

This rule, giving a uniform rate of six per cent. interest without reference to the law in the State from which the appeal was taken, worked injustice in those jurisdictions where the rate of interest exceeding that per centum, and this matter being brought to the attention of the court, in *Sneed vs. Wister*, 8 Wheaton, 691, and in other cases, the rule was modified, at the December Term, 1851, to read as follows:

No. 62. "In cases where a writ of error is prosecuted in the Supreme Court and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment is rendered." "The same rule shall be applied to decrees for the payment of money in cases in chancery, unless otherwise ordered by this court."

This last rule was considered by Mr. Chief Justice Taney, in the case of *Hemmenway vs. Fisher*, 20 How., 255, in which he says: "By this last mentioned rule, judgments at common law and decrees in chancery, upon affirmance in this court, carry interest until paid; and *the interest is to be*

calculated according to the rate of interest allowed in the State in which the judgment or decree of the court below was given."

This construction of the statute and rule is that which is adopted by Mr. Curtis in his Commentaries, sec. 396. No distinction is made in this statute or in the rules of the Supreme Court as to the character of the action on which the judgment is rendered. The object of the interest by way of damages is to give the appellee just damages for his delay, and it is obvious that a greater necessity exists for discouraging appeals in actions *in personam*, for the reasons we have heretofore assigned, than in actions brought upon contracts where the suit can be continued notwithstanding the death of the party plaintiff.

In our judgment the rule was intended to apply to all cases of appeals, at law or in equity, whatever may have been the form of the action.

Second. Speaking for myself alone, I will further say, that if the propriety of the charge of interest on this judgment were dependent upon the character of the action, I have no doubt, in that event, equally, the plaintiff was entitled to recover interest on this judgment from the time of its rendition, at the rate of six per cent.

In opposition to this view it was argued that interest was not chargeable at common law on a judgment in tort. This is true, and it was equally true at the common law with respect to all contracts, and so remained until the 37 Henry VIII, ch. 9, which repealed the existing laws that denounced all reception of interest as usury. But from a very early day in Maryland interest was computed upon judgments, upon affirmance on appeal, and so far as I can see, without respect to the character of the action.

Naturally, the books of reports of the appellate courts would seldom set forth the form of such entries in the lower courts ; but they do contain some cases on the subject.

Thus in *Hook vs. Boteler*, 3 H. & McH., decided in 1793, a judgment was recovered under the act of 9 Anne, ch. 14, which gave an action to recover back money won at gaming where over £10 was lost at a sitting. The action was in no

sense founded upon contract, but was a statutory remedy to recover the money lost. The verdict was for the defendant, under the instruction of the court, but it was reversed in the court of appeals and judgment entered for £120 damages and costs, which damages were represented by interest upon the judgment.

So in *Howard vs. Warfield*, 4 H. & McH., 38, decided in 1797.

These cases were before the cession of the District by Maryland. The early Maryland cases, about the time of the cession, seem to admit the correctness of this practice, without reference to the form of action. *Contee vs. Findlay*, 1 H. & J., 381 (1802); *Johnson vs. Goldsborough*, *ibid*, 499 (1804).

We were referred to the act of June 24, 1812 (sec. 829 R. S. D. C.), as the earliest authority for the addition of interest upon any judgment in the courts of the District. That act provided, "upon all judgments rendered on the common law side of the court, *in actions founded on contracts*, interest at the rate of six per centum per annum shall be awarded on the principal sum due until the judgment shall be satisfied; and the amount which is to bear interest, and the time from which it is to be paid, shall be ascertained by the verdict of the jury sworn in the case;" and it is insisted that no right to allow interest on judgments existed before the passage of that act, and that it contains a distinct limitation of the allowance of interest to "*actions founded on contracts*."

What the purpose of the legislature was in passing this statute, we can only conjecture. It may have been because the existing practice here was unknown to Congress; or because a different practice prevailed in the courts in the two portions of the District; or because the interest had been entered in different ways upon judgments rendered in the courts in the Maryland territory. Certain it is that it was not the origin of the practice of allowing interest upon judgments in those courts held in Washington city. We have examined the earliest dockets of the circuit court,

accessible at this time—those of 1802—and we find that judgments were constantly entered, at that period, with an allowance of interest, in some cases from a date previous to the suit, and in others from the date of the judgment. The act of 1812, then, was not the origin of the practice. Nor do I see that it implies a negation of the right to interest upon judgments not founded upon contract. It only secures to the jury the power to allow interest in that class of cases from a date previous to the judgment; but it leaves the computation in actions of tort where, as I think, it had previously been, to be reckoned *from the date of the judgment*.

Justices of the peace within the District have jurisdiction in a large class of civil cases, whether in debt or damage, or injury to person or property, and they are required to enter their judgments in dockets which they are obliged to keep. By section 1007 R. S. D. C., their “judgments shall bear interest from their date until satisfied,” and this by virtue of the act of March, 1823. No distinction is here made between judgments recovered in variant forms of action. The language embraces *all* judgments whether sounding in contract or tort. And no good reason can be perceived why a different rule should prevail with respect to judgments rendered by justices of the peace and those rendered by the superior courts of the District, especially as the judgment of the justice may become, by appeal, the judgment of the Supreme Court of the District. We should expect to find symmetry rather than needless disagreement between essential parts of the same system; and the explicit language of section 1007 must certainly go far towards clearing up any doubts as to the proper form of judgments in this court.

The language of our rule, No. 70, seems to recognize no difference between the form of entry of judgments in contract and in tort. Its language is: “*Whatever the cause of action may be, if the judgment be for the recovery of money, it shall be awarded generally, without any distinction of debt from damages, thus: “It is considered that the plaintiff recover against the defendant \$——, with interest as aforesaid,” &c.*

But I consider that the language of section 713 R. S. D. C. is almost conclusive of the question. It declares (speaking in 1870) that "the rate of interest on judgments or decrees * * * *shall continue* to be six per cent.; not upon judgments *on contracts* alone, but upon *all* judgments, as well as upon *decrees*, then for the first time specially designated in a statute as bearing interest. No sound reason can be assigned why the legislature should recognize the propriety of allowing interest upon a judgment arising out of a contract which would not equally apply to a judgment upon a tort. Indeed, the reason originally assigned at the common law for denying interest is confined, in terms, to the case of a sum certain, payable at a given day. As formulated in the early authorities it amounted to this: that the action of debt was the only mode of recovering a sum certain, except where there was a breach of covenant, and in that action as the defendant was commanded to render the debt, the payment of the specific sum, without anything more, answered the action and put an end to the suit; and thus the interest, forming no part of the original debt, was created only by the nature of the security. It was argued that this general rule would prevent acts of kindness from being converted into mercenary bargains; and as it would thus be the interest of traders to press for payment, it would tend to check the pernicious extension of credit, so often injurious to both parties. *Anderson v. Dwyer*, 1 Sch. & Lefr., 303.

But none of these considerations apply to an action of tort. The jury is not called upon to determine that a specific sum was due at a designated day, and to add interest, as such, from the day named. They are simply to award compensatory or perhaps punitive damages in a just amount, which they return as their verdict, as a principal sum. And the question for consideration simply is whether a defendant in such a case, who may have maimed a plaintiff so that he was in danger of death, or destroyed his property, or debauched his child, after using his wealth to put off the trial to the latest day, may delay payment of the judgment with impunity, without liability for a cent of interest,

while the plaintiff is following him through motions for a new trial, and prosecuting suits in equity to set aside conveyances, executed with the design of wearing out the patience and exhausting the means of the person he has injured.

I can see no reason for any such discrimination in favor of such a class of defendants.

Again, I think the language of section 966 R. S. U. S., if not decisive of this question in itself, is certainly of the greatest force as showing what class of judgments was referred to by Congress when it fixed the rate of interest in the District of Columbia by section 713 R. S. D. C.

That section declares : "Interest shall be allowed on *all* judgments in civil causes recovered in a circuit or district court, and may be levied," &c., "and shall be calculated from the date of the judgment at such rate as is allowed by law on judgments recovered in the courts of such States."

No one can doubt that a judgment in tort, recovered in the Circuit Court in Baltimore would bear interest under this section. Why should a different rule prevail here, in favor of a defendant who has been found culpable, by the verdict of a jury? If this section applies to the courts of the District, it ends the inquiry. And if it be supposed that our local law should be the guide in the inquiry, then sec. 713 of the local law, when considered in the light of this section, must be held equally conclusive of the question before us.

In *Gibson vs. Engine Co.* (6th Ohio Circuit Reps., 135), the presiding justice held that where the entry of the judgment was delayed by the acts of the opposite party, interest on the verdict was proper, whether the action sounds in contract or in tort; and that if the action is upon contract the verdict draws interest from the first day of the term, but if *ex delicto*, from the date of the rendition of the judgment.

In the case of the District of Columbia *vs. B. & P. Railroad Co.*, 1 Mackey, 380, the present defendant had been sued by the District to obtain the amount of a judgment recovered by one Barnes against the District, for an injury resulting from falling into an excavation in the street, made

by the railroad company. The District paid Barnes the amount of the judgment, with costs and interest from its rendition, and then brought suit against the company and recovered judgment, which was affirmed by the Supreme Court. The company, there, as in this case, insisted that it was only liable for the principal of the judgment recovered by Barnes, and that the District had paid him the interest in its own wrong and could not recover it from the company. The General Term decided that the company was liable to return to the District the entire amount it had paid to Barnes. And I regard this as a decision that Barnes was justly entitled to interest upon his judgment, for if the interest was not a just charge against the District, the General Term could never have justified its exaction from the company. It surely would not have required the company to pay the fees of Barnes' lawyers if the District had carelessly or wrongfully paid them, with the principal of the judgment. I think we decided this question, effectively, in that case, and for this reason, with the others I have mentioned, I consider it the law of this District that a judgment founded on a tort bears interest from its rendition to its satisfaction.

EMMA S. BURDETTE vs. OLIVER P. BURDETTE.

{ Decided June 14, 1883.
{ JUSTICES HAGNER, COX and JAMES sitting.

EQUITY. No. 8,180.

1. Section 876 and 877 of the Revised Statutes of the District of Columbia, regulating the competency of parties to actions, suits, &c., as witnesses, does not apply to suits for divorce *a vinculo*.
2. But in a suit for a divorce from bed and board, on the ground of cruelty, the petitioner may, under the 98th Equity rule of this court, be examined as a witness as to any cruel or inhuman treatment, alleged in the petition to have taken place where no witness was present competent to testify. In all other cases the parties are incompetent.

THE CASE is stated in the opinion.

COOK & COLE for complainant.

J. J. DARLINGTON for defendant.

Mr. Justice JAMES delivered the opinion of the court.

This is a suit for divorce *a vinculo*. In taking the testimony before an examiner, the petitioner was offered as a witness in her own behalf, and upon objection by counsel for the defendant, the question of her competency was certified by the examiner to the Special Term in Equity. By that court it has been certified to be heard here in the first instance.

It seems to have been very commonly supposed by the bar that section 876 of the Revised Statutes for this District authorizes the examination of parties to suits for divorce in all cases except where adultery is charged as the ground of the application; and this error has led to fruitless suits and to unnecessary costs.

The competency of parties to testify is regulated by sections 876 and 877 of the Revised Statutes, which are drawn from section 1 of the act of July 2, 1864, 13 Stats. at Large, 379. Section 876 provides that, "On the trial of any issue joined, or of any matter or question, or any inquiry arising in any suit, action, or other proceeding in any court of justice in the District, * * * *the parties thereto*, and the persons in whose behalf any such action or proceeding may be brought or defended, and all persons interested in the same,

shall, except as provided in the following section, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the court, on behalf of any of the parties to the action or other proceeding.

Section 877 provides that, "Nothing in the preceding section shall render any person who is charged with an offense in any criminal proceeding competent or compellable to give evidence for or against himself; or render any person compellable to answer any question tending to criminate himself; or render a husband competent or compellable to give evidence for or against his wife, or a wife competent or compellable to give evidence for or against her husband, in any criminal proceeding or in any proceeding instituted in consequence of adultery.

"Nor shall a husband be compellable to disclose any communication made to him by his wife during marriage; nor shall a wife be compellable to disclose any communication made to her by her husband during marriage."

Undoubtedly, if taken literally, the language of section 876 would include suits for divorce *a vinculo*; but we think that it is not to be so taken, and that several provisions of the next section indicate the paramount reasons of public policy which forbid us to apply at all to parties to divorce suits, the general provision which allows parties to suits to testify as witnesses.

It is to be remembered that, although marriage originates in the consent of parties, that relation, once established, has always been treated by the common law and by the laws of all nations as an institution of society, in which society had an interest which was, if possible, paramount to that of the parties themselves; and that, long before the act of 1864, it was settled to be a matter of public policy, recognised by legislative and judicial authority, that the parties themselves should have no power to dissolve or impair its obligations by their own act. This policy is not only recognized but declared in the most impressive manner by several of the provisions of section 877. It might seem that nothing could

be more important to society than the conviction and punishment of criminals who violate its peace; yet the legislature has declared, by the provisions of this section, that the preservation of its fundamental institution of marriage is even more important to society than the punishment of its criminals, and that husband and wife shall not be arrayed against each other as witnesses, even for the purpose of public justice. Crime shall not be proven by such testimony, even if it must thereby go unpunished. When the preservation of the family is thus placed by this very statute above the protection of the public peace against crime, can it be for a moment supposed that the same statute intends that the very institution which is thus treated as of paramount importance shall itself be the occasion of arraying husband and wife against each other as witnesses? We only weaken this argument by dwelling upon it. It is clear to us that the very act which renders parties to suits competent and compellable as witnesses indicates that the rule is not to be applicable to parties to suits for divorce.

It may be added that the incompetency of such parties to testify results from another statute, which was re-enacted as a part of the revision at the same time with section 876. Section 737, which is drawn from section one of the act of June 19, 1860, 12 Stats. at Large, 59, provides that no judgment for a divorce shall be rendered on default without proof; nor shall any admissions contained in the answer of the defendant be taken as proof of the facts charged as the ground of the application, but the same shall in all cases be proved by other evidence." Of course the act of 1864 was not intended to impair the effect of this provision, and any such result has been prevented by the re-enactment of both as parts of one body of law. But the application of section 876 to parties to divorce suits would very seriously impair the effect and purpose of section 737. If it were so applied, the defendant might admit in a deposition the facts charged. It would be to no purpose that admissions in a sworn answer, which are in fact in the nature of testimony, should go for nothing, if the respondent might, as a witness, state the

same facts on the stand. Upon these grounds, we are of opinion that section 876 has no application to parties to suits for divorce. It was intended only to remove that disability which arose from the single fact of being a party, and does not affect disqualifications which rest upon other grounds. For example, a party who is infamous is not thereby made competent because the disability of parties is removed.

We have explained the grounds of our conclusion as fully as if this were a new question, since the reports of this court contain no decision on this point. It should be observed, however, that the same rule has been more than once announced by the General Term ; the last time in *Russell vs. Russell*.

There is one matter, however, in one class of suits for divorce, concerning which the petitioner may, *under a rule of this court*, be examined. Equity Rule 98 provides that, "On reference to take proof of the facts charged in a petition for a divorce from bed and board, the examination of the petitioner, on oath or affirmation, may be taken as to any cruel or inhuman treatment alleged in the petition to have taken place when no witness was present competent to testify. In all other cases the parties are incompetent.

The examiner is instructed not to take the testimony of the petitioner in this cause.

B. U. KEYSER, Receiver, vs. JANE C. HITZ.

AT LAW. No. 22,261.

{ Decided June 26, 1883.

{ Justices HASKIN, COX and JAMES sitting.

1. The act of Congress of June 30, 1877 (19 St., 94), is substantially an enactment that the acts of Congress relating to national banks, including the provisions of Section 5154, providing for the conversion of banks into national banks, shall be applicable to *savings* and other banks in this District, except that savings banks existing at the time of the passage of the act are not required to have a capital of \$100,000 in order to be converted into national banks. It was competent, therefore, for a savings bank organized in this District under the General Incorporation acts of May 5 and June 17, 1870 R. S. D. C., § 553, to avail itself of the law for converting banks into national banks.
2. The certificate of the Comptroller of the Currency is conclusive as to the regularity of the proceedings by which any bank has been converted into a national bank.
3. Where a shareholder of a corporation is called upon to respond to a liability as such, he is not permitted to deny the existence of such corporation.
4. Where the owners of more than two-thirds of the stock of a bank consent to the conversion of the bank into a national bank, such a conversion may take place without the concurrence of the remaining stockholders.
5. While it might be more regular, on the conversion of a bank into a national bank, for a new stock book to be opened and new certificates to be issued in the name of the national bank, yet as there is nothing in the law prescribing the form of the stock book, or of the certificates of stock, there is nothing to prevent the new bank from treating the old books and certificates as sufficient evidence of title in the concern; neither the rights nor liabilities of the stockholders could be affected by the mere omission to issue a new form of stock certificate to them. To hold otherwise would be to allow all the stockholders to escape liability by the mere omission of the formality of issuing the shares in a new form.
6. Where a stockholder of the old bank has given his consent that the stock should be converted into stock of the national bank, he becomes by virtue of that consent a stockholder in the new bank, notwithstanding any omission to issue new certificates of stock.
7. Under the Married Woman's Act of 1869, R. S. D. C., the right of a married woman to hold bank stock, acquired by her during marriage, otherwise than by gift or conveyance from her husband, is as absolute as if she were unmarried; she can convey, devise and bequeath it in the same manner and with like effect as if she were unmarried, and may contract, sue and be sued in her own name, in all matters having relation to it; she is also amenable to all the consequences of its ownership and of its conversion into national bank stock, including the individual responsibility of stockholders, in the same manner as if she were a *feme sole*.
8. Where the wife acquires property by gift or conveyance from her husband, she holds it, as she would at common law, with a qualified property in her husband, being unable to assign it without his consent; and she is liable, if it is a *chose in action*, to have it reduced to his possession.

9. Stock of an incorporated company is a *chose in action*.
10. Where a married woman holding savings bank stock derived by gift or conveyance from her husband agrees with his consent to convert the stock into national bank stock, she thereby regularly and legally acquires title to the latter stock; and although she still holds the new stock subject to the marital rights of her husband, she is nevertheless subject to the individual responsibility of national bank stockholders, and may be assessed for all losses and be compelled to pay out of her other estate to the amount of the par value of her stock.
11. It seems, however, that it might be otherwise if the transfer of the stock to her and its subsequent conversion were made without her knowledge or consent.
12. The liability incurred by a holder of national bank stock, to be assessed to the amount of the par value of the stock for all losses of the bank, is a statutory liability, and not a contract one. It is a liability imposed by the statute as an incident of the ownership of the stock, and attaching to all who are capable of that ownership, without reference to any supposed voluntary assumption of the liability by express or implied contract. Therefore, where national bank stock is held by a *feme covert*, either in her own right or subject to the common law marital rights of her husband, the liability to be assessed affects her alone, and a suit to enforce the collection of the assessment is properly brought against her without joining her husband, as would be necessary in the enforcement of any common law obligation or liability of the wife.

THE CASE is stated in the opinion.

ELLIOT & ROBINSON for plaintiff:

The National Bank Act provides that such banks may be formed by any number of natural persons not less than five, upon the conditions therein prescribed; Rev. Stats., sec. 5133; and that any bank incorporated by special law, or any banking institution organized under a general law of any State, may become such a national association *Id.*, sec. 5154.

An act of June 30, 1876, further provides (19 St., p. 64), that all savings banks and trust companies organized under authority of any act of Congress shall be required to publish all the reports which national banking associations are required to make and publish, and shall be subject to the same penalties; and all savings or other banks now organized, or which shall hereafter be organized, in the District of Columbia, shall be subject to all the provisions applicable to national banks. The general incorporation law in force in this District also provides for the individual liability of all stockholders in any company organized under its

provisions to the amount of the stock of each stockholder. Rev. Stats., § 574.

It is submitted that the national bank act is a general statute of the United States providing for the organization of national banks by all persons and in all places subject to the legislation of Congress, wherein it could not possibly have been intended to discriminate against the District of Columbia. In the organic act of this District it is enacted that "all the laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said District of Columbia as elsewhere within the United States."

In *Page vs. Burnstine*, the question was whether the statute, which declares that in actions by or against executors, &c., neither party shall be allowed to testify against the other as to any transaction, &c., applied to the courts of the District of Columbia as fully as to the circuit and district courts of the United States. The language used by the Supreme Court in that case would have to be modified very little to dispose completely of the point made by the plea under consideration. "The same considerations of public policy, which would require the enforcement of such a statute as that of March 3, 1865, in the circuit and district courts of the United States, without regard to the laws of the respective States on the same subject, would suggest its application in the administration of justice in the courts of this District." 102 U. S., pp. 667,668.

Irrespective, however, of any force or want of force in these views the Supreme Court of the United States has passed judgment on the identical plea in another case, in terms which can hardly fail of application to the present one. In *Casey vs. Galli*, the 2d plea was that there was no such corporation, because the Bank of New Orleans had no power by its charter, nor authority otherwise from the State of Louisiana to change its organization to that of a national banking association under the laws of the United States; and the 3d, that there was no such corporation, because the owners of two-thirds of the capital stock of the Bank of

New Orleans did not authorize the bank to be converted into a national banking association under the laws of the United States—wherefore, by both pleas, it was prayed that the declaration be quashed. Held—"the pleas were properly in abatement and not in bar." And, 2d, "the plea proposes to go behind the certificate and contradict it. This cannot be done. The comptroller was clothed with jurisdiction to decide as to the completeness of the organization, and his certificate is conclusive upon the subject for all the purposes of this litigation. It has the same effect, and for the same reason, as his determination and order with respect to the amount to be collected from each stockholder in the event of the failure of the association. No question can be raised in this collateral way as to either." It is added: "There is another ground upon which both pleas must be held bad. Where a shareholder of a corporation is called upon to respond to a liability as such, and where a party has contracted with a corporation, and is sued upon the contract, neither is permitted to deny the existence or the legal validity of such corporation; to hold otherwise would be contrary to the plainest principles of reason and of good faith, and involve a mockery of justice. Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have made appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent, in its effects and consequences, should be as if it were real and the law properly so regards it." 94 U. S., pp. 678, 679 and 680; *Hadly vs. Baker*, 20 Wall., 650; *Wheelock vs. Rost*, 77 Ill., 296; *Huffaker vs. Bank*, 12 Bush., 287.

Finally, it will be observed that the Supreme Court, in the case cited, decides the plea to be one in abatement. Such is its character in point of fact, however it be pleaded. As such it is a nullity when put in after a plea in bar, or after an order to plead an issuable plea. *Palmer vs. Green*, 1 Johns Cas., 101; *Engle vs. Nelson*, 1 Pen Watts, 443; *Chamberlain vs. Hite*, 5 Watts, 373; *Tavis vs. Hitner*, 9 Barr., 447; *Kilwick vs. Maidman*, 1 Burr., 59; *Bernham vs. Web-*

ster, 5 Mass., 268 ; *Shepherd vs. Graves*, 14 How., 510 ; *Martin vs. Com.*, 1 Mass., 358 ; *Eaton vs. Whitaker*, 6 Pick., 465 ; *Lyman vs. Albee*, 9 Verm., 508 ; *Malone vs. Clarke*, 2 Hill, 658 ; *Howard vs. Rawson*, 2 Leigh, 738 ; *Good Intent Co. vs. Hartzell*.

In the light of these authorities, and of the facts of the present case, it is submitted that the only real issue presented to the court is whether a married woman is exempted by the fact of coverture from liability as a stockholder in a national bank.

The construction of a shareholder's liability, under the national bank act, leaves very little room for its evasion. That liability is fixed when the stockholder becomes a member of the corporation, by taking stock therein, and is several and not joint. *Bailey vs. Sawyer*, *Thompson's National Bank Cases*, 356.

A person who appears upon the books of a national bank as the legal owner of shares of its stock is, upon the failure of such bank, liable for the debts of the association to the extent of the shares held by him, although he received and holds such shares as collateral security for a loan to a shareholder. *Hale vs. Walker*, 31 Iowa, 344.

Persons who hold stock of a national bank in pledge, the certificates of which stand on the books of the bank in the name of the pledgee, are, in contemplation of the national banking act, stockholders, and so long as they thus hold the stock in pledge, are responsible to the creditors of the bank in proportion to the amount so held. *Magruder vs. Colston*, 44 Md., 849. And see, *Johnson vs. Laffin*, 5 Dil., 65 ; *Moore vs. Jones*, 8 Woods, C. C., 53 ; *Young vs. Vough*, 28 N. J. Ex., 325.

A person who allows a transfer to be made to him upon the books of a national bank of shares therein, even though such transfer is made solely as security for a debt due the transferee, is liable as a shareholder, under U. S. Rev. Stat., sec. 5139. *Moore vs. Jones*, 8 Wood, C. C. 53.

ENOCH TOTTEN for defendant :

First. There was no authority for the conversion of the "Saving Bank" into a "National Association," as was attempted May 14th, 1877.

The forty-fourth section of the act of June, 1864, the original law establishing the national bank system, applies only to "banks incorporated by *special law*" of any State, or "any banking institutions organized under a *general law*" of a State. It cannot be successfully argued that these terms can include "savings banks" in this District, organized in pursuance of the authority and powers of the general law of Congress, governing the organization of such institutions in the District of Columbia. This latter act was passed May 5, 1870, and was made to include savings banks, June 17th, 1870, and about six years after the National Currency Act went into operation; this German American Savings Bank was organized September 24th, 1872.

The authority produced by the plaintiff for the creation of this *national* bank consists solely of a document, dated May 7, 1877, purporting to be signed by stockholders of the *savings* bank, empowering the trustees thereof to convert it into a national bank, "under the sections of the Revised Statutes which authorize the conversion of *State banks* into national associations" (Sec. 5154), and "to make and execute the articles of association and organization certificate required to be or contemplated by said statutes;" and to execute all papers, and do all acts necessary to be done "to convert said German American Savings Bank into a national banking association," and to transfer the assets to the proposed national bank, &c. 17.

There was no evidence that anything beyond this was done, except that on the 14th of May, 1877 (20), a public proclamation was made announcing the existence of the national bank, and its authority to commence business. This certificate, in its form, follows the provisions of section 5154, relating to conversion of State banks. None of the

proceedings seem to have been taken under any of the other provisions relating to the formation of national banks. See Secs. 5133-4-5-6 R. S., p. 996.

No aid for this extraordinary assumption of power can be derived from the Act of June 30th, 1876. The most that can be drawn from that act, in this direction, must come from the concluding provisions and language of the sixth section ; these declare that *savings'* bank or *other* banks in this District "shall be subject to all the provisions of the revised statutes and of all acts of Congress applicable to national banking-associations, so *for as the same may be applicable to such savings or other banks.*" It is plain that no change in the character of these institutions was here contemplated ;—the acts of Congress mentioned are to govern so far as the terms thereof may be "applicable" to such institutions and no farther ; those parts of the acts which may be inapplicable to "*savings*" or to that system, shall not apply. This is the plain interpretation of the statutes. Instead of contemplating the dissolution or destruction of savings banks, the legislation clearly intended their preservation and protection, as well as to guard the interests of depositors. The only operation of the law of 1876, requiring reports and examinations, was to give to the Comptroller of the Currency a general supervising power and guardianship over them. This is plain from the *proviso* of the Act of 1876, which declares that "*savings banks*" then existing, should not be required to have a capital of over \$100,000.

The primary characteristics of savings-banks are (1), the capitalization of interest on the sums deposited ; (2), the holding of those sums at call, with or without previous notice, as the rules of the particular institution may prescribe.

Webster defines savings-bank as follows : "A bank in which savings or earnings are deposited and put to interest."

It will not escape notice that the business, prescribed and limited for the national banks, is wholly inconsistent with the idea of "*savings*" banks ; in the "*savings bank*" system

the capitalization of small earnings or savings is the ruling principle ; these earnings or savings are concentrated by the savings bank, and are invested in permanent securities, being either in real estate securities or in Government or other bonds.

The general statute authorizing the creation of "savings banks" and other corporations in the District of Columbia, R. S. D. C., § 553, provides that upon making and filing the certificate prescribed by the act, the persons "shall be a body politic and corporate in fact and in name ;" may sue and be sued ; have perpetual succession ; have a seal ; adopt rules and regulations ; purchase, hold and convey real and personal estate necessary to carry on its "operations named in" the certificate, &c.

National banks are authorized by law, (R. S., 5133) to "carry on the business of banking ;" the law requires that the certificate shall state the town, the place where the operation of "*discount and deposit*" shall be carried on, the amount of capital stock and the number of shares. The "business of banking," as defined in the R. S., sec. 5136-7 to consist in discounting and negotiating notes, drafts, bills, and other evidences of debt, receiving deposits, buying and selling exchange, coin and bullion, loaning money on "personal security," circulating its notes, &c. They are forbidden by law to lend money on *real estate*, or to hold real estate, as security, except for previously contracted debts § 5137.

The two systems of business are wholly different, and are intended to subserve entirely different objects and ends. These considerations, it should seem, conclusively establish the correctness of the interpretation of the sixth session of the Act of 1876, contended for by the defendant—that is to say, that those provisions were to affect savings banks only so far as they were applicable to the "savings" principle.

Applying to this transaction the familiar rules, which apply as well to corporations as to public officers, that no powers will be presumed except those which follow necessarily from the general grant of power, it will be difficult to

find any statutory authority for the existence of this National Bank. See *Morrill vs. Jones*, 106 U. S. 466.

If the defendant is liable at all, it must be under the provisions of the general incorporation act of the District of Columbia.

Second. Mrs. Hitz never bought or paid for a single share of this stock, and the transfer of the stock, which appears on the books in her name, was a fraud.

It will be observed that there was no stock issued to or held by the defendant in the alleged *national* bank; all that was done was to make an attempt to transfer to her name, on the books of the *savings* bank two hundred shares of the *savings* bank stock; no change was made, or attempted, as to the character of the stock. Even if the conversion or attempted change of the character of the institution was lawful, no part of the statute converts the stock of the original bank into stock of the new institution; all that the Currency Act permits (as to State banks), is that the shares * * * may continue to be for the same amount * * * as they were before the conversion.

The only evidence that the defendant ever had any knowledge of this transfer of savings bank stock, offered at the trial, consists in three dividend checks, payable to her order, and endorsed by her to her husband, to whose credit the amount of each check was passed; also the document purporting to be signed by stockholders of the savings bank, authorizing the trustees of that institution to cause the savings bank to be converted into a national bank. This document purports to have been signed by the defendant. There was no effort made, and no evidence offered to show that the defendant signed either of these four documents. Although this "national bank" was in operation for more than a year, no dividend checks were ever issued to the defendants upon stock of that bank. There was not a word of proof offered to show that she ever had any interest in such bank stock.

Third. If the court should be of opinion that the defendant is bound by this record, then it is submitted that the

largest part of the stock—to wit, \$17,800—was the property of the defendant's husband, and was taken by her, if at all, by "gift or conveyance from her husband."

The law of the District, as to married women, being the act of April 10, 1869, is as follows:

"In the District the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage *in any other way than by gift or conveyance from her husband*, shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband, nor be liable for his debts.

"Any married woman may convey, devise and bequeath her property, or any interest therein, in the same manner and with like effect as if she were unmarried.

"Any married woman *may contract*, sue and be sued, in her own name, *in all matters having relation to her sole and separate property*, in the same manner as if she were unmarried." R. S. Dist. of Columbia, Secs. 727-8-9.

This statute relates to the "sole and separate property" of married women, acquired either before marriage or after marriage, if it be not through "gift or conveyance" from her husband. The transaction involved in this case, upon any theory, lacks two essential ingredients to bring it within this statute, and to hold the defendant to liability:

1. This stock is not in any sense the "sole and separate property" of the defendant.

2. It was either a "gift" or a "conveyance" from her husband, if it was anything. See *Ritch vs. Hyatt*, 3 Mac Arthur, 588; *Sykes vs. Chadwick*, 18 Wall., 141. The bond or other contract of a married woman is, at common law, absolutely void—not voidable. *Agricultural Bank vs. Rice*, 4 How., 225.

This act of June, 1864 (the National Currency Act), did not change, but was made in contemplation of, the common law. The Married Woman's Act, in force in this District, was approved and became a law April 10, 1869, long after the Currency Act, and hence must be held to govern, if the two acts are in conflict as to any parts.

The shareholders of every National Bank are to be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association to the extent of the amount of their stock therein at the par value thereof in addition to the amount invested in such shares. At common law, except in several well known cases, a married woman could not bind herself by contracts, nor has her general power in this respect been enlarged by statute. Where it is sought to charge her with contract liability by the provisions of any statute, it must clearly appear that such statute conferred upon her power to engage the liability, and such statute will be construed strictly. No such power will be inferred from language that does not expressly confer it. A case has recently been decided in the Supreme Court of Pennsylvania which illustrates these principles. In *Wallach et ux. vs. The Lehigh Building Association*, 3 Norris, 211, it was decided that a married woman was incapable of incurring the liabilities she undertook to assume by becoming a member of a building association; it was held that she was not liable for the dues and fines of her share of stock, nor for money that she had borrowed upon them. The authorities on this subject are fully corrected in a recent book. *Husbands on Married Women*; Chapter 7; see also *Rice vs. R. R. Co.*, 32 Ohio St.

Substantially the same doctrine has been repeatedly recognized and adopted in the federal courts.

A paper executed under seal for the husband's benefit by husband and wife, acknowledged in separate form by the wife, and meant to be a mortgage of her separate lands, but with blanks left for the insertion of the mortgagee's name and the sum borrowed, and to be filled up by the husband and given to a lender of money, though *bona fide*, and without knowledge of the mode of execution, the mortgagee, on cross-bill to a bill for foreclosure, was directed to cancel her name. *Drury vs. Foster*, 2 Wall., 24.

The bond of a married woman is void, and the promise of a *feme covert* is void. *Agricultural Bank vs. Rice*, 4 Howard, 225; *Watson vs. Dunlap*, 2 Cr. C. C., 14.

By the common law, a married woman could not bind herself, or render her separate estate liable. Where such power is given by statute, it is only to the extent conferred by the act which is to be strictly construed. *Boyd vs. Withers*, 1 Chicago Leg. News, 401.

Congress has, in a recent act, deemed it necessary to use express words to make a married woman liable upon her obligation given upon being appointed post-mistress. Section 3834 of the U. S. Revised Statutes (being act of 3d March, 1877), enacts, *inter alia*:

"The bond of any married woman who may be appointed postmaster shall be binding upon her and her sureties, and she shall be liable for misconduct in office, as if she were sole."

In Thompson on Liability of Stockholders, sec. 227, it is said :

"The general rule is, that transfers to a transferee incapable of taking are void, as to creditors and non-assenting shareholders, and the transferor remains a contributory, as though no transfer had been made." And see sec. 23 ; also Lindley on Partnership, page 836 (*1091).

A married woman could not, at common law, make a valid power of attorney, *Drury vs. Foster*, 2 Wall., 20, and a married woman is not estopped to deny the validity of a mortgage. Same, 34 : see, also, *Lewis vs. Cammack*, 15 Wall., 648.

On the trial in the circuit court, counsel for plaintiff seemed to rely upon the decision of the Circuit Court of the United States for the Eastern District of Pennsylvania, in the case of *Anderson vs. Jesse M. Line and Mary L.*, his wife, 14 Fed. R., 405. The defense in that case was based solely on the ground that the defendant was a married woman, and that as such she could not, under the laws of Pennsylvania, make a valid contract of the kind sued upon. It seems to have been conceded there that she actually *owned* and *held* stock in a national bank at the date of its failure, and that the certificate representing the stock had been obtained *for her*, and was delivered to, and was held by her.

In the present case the defendant never received or saw the certificate of transfer, and did not hold it either herself or by her agent, and nearly the whole of it was transferred on the books of the savings bank to her *by her husband*. No proof was offered at the trial to sustain the replication to the plea of coverture; no attempt was made to prove that the defendant ever paid anything for the stock out of her own funds or out of any funds. So far as the proof upon which the case was submitted goes, the transfer was wholly without consideration, and therefore, in such a case it must be held to be a subterfuge and a fraud.

Not a word of proof was tendered by the plaintiff to establish the averment of ownership, or to show that the stock appertained to the *separate* estate of the married woman. This omission was not an oversight; there was and is no proof that the defendant ever bought or bargained for the stock, or that she ever held or paid one cent for it; the transfer was made for some ulterior purpose not disclosed at the trial.

Because of the absence of evidence to show that the stock was owned by her *as her separate estate*, and because of the presence of undisputed evidence that nearly all of it was transferred on the books by the husband, the president of the bank, to his wife, the court directed a verdict for the defendant; this was clearly right.

The cases are abundant to show that formal and fraudulent transfers of the stock of national banks will be disregarded, and the true owner held on his statutory liability. Hitz was clearly the owner of this stock. See *National Bank vs. Case*, 99 U. S., 62; *Davis vs. Stevens*, 17 Blatchf., 259.

The fact, which is undisputed, that the husband, in each instance, collected and appropriated to his own use the proceeds of the dividend checks, is a strong circumstance towards proving that the stock was his, and not the property of his wife.

There was no proof offered to show that the certificates made out in the name of the defendant were ever shown to

her or brought to her attention, or that they ever passed out of the hands of the savings bank. The ordinary way of transferring this kind of stock is by endorsement and delivery of the certificate; when the owner endorses and delivers the certificates for a consideration, the title passes to the purchaser, and no transfer can be made except on surrender of the certificate. *Bank vs. Lowrie*, 11 Wall., 369; *Johnson vs. Laffin*, 103 U. S., 800.

Mr. Justice Cox delivered the opinion of the court.

On the 24th of September, 1872, the German American Savings Bank was incorporated under the General Incorporation Acts of May 5 and June 17, 1870, with a capital of \$127,000.

On the 21st of January, 1876, John Hitz transferred to the defendant, Jane C. Hitz, his wife, 173 shares of the stock of that bank, of the par value of \$17,300.

On the same day, Wm. F. Mattingly transferred 10 shares, R. B. Donaldson, 10 shares, and C. E. Prentiss, 7 shares, of the stock to Mrs. Hitz, thus making her the owner of 200 shares, of the par value of \$20,000.

In further proof of the ownership, three checks were put in evidence, dated respectively, May 1, 1876, November 1, 1876, and May 1, 1877, each for \$800, signed by C. E. Prentiss, cashier, in favor of Mrs. Hitz, for dividends upon the stock in her name, all apparently indorsed by her to her husband.

On the 7th day of May, 1877, a paper was signed apparently by all the stockholders, including Mrs. Hitz, authorising and empowering the trustees to change and convert the savings bank into a national banking association, under acts of Congress in such case made and provided, and to execute the articles of association and organization certificate required by the statute, &c., the new bank to bear the name of the German American National Bank of Washington.

On the 14th of May, 1877, J. S. Langworthy, acting comptroller of the currency, executed the certificate required by

law, that the German American National Bank of Washington is authorized to commence the business of banking, as provided in section 5169 Rev. Stat.

It does not appear that any new stock book was opened, or new certificates of stock issued in the name of the new bank, but the books of the old bank were transferred to the new, and the stockholders in the old, were assumed to be stockholders in the new bank.

Sworn lists of these stockholders of the German American National Bank, were, from time to time, furnished to the Comptroller of the Currency, in conformity with law, all of which included Mrs. Hitz's name.

On the 20th of October, 1878, the German American National Bank, of Washington, failed and suspended payment, and the plaintiff was appointed receiver of the bank, by the comptroller of the currency.

On the 11th of June, 1880, the comptroller certified that, upon an examination of the affairs of the bank, he found it necessary to enforce the individual liability of the shareholders of the bank, as provided by act of Congress, and thereupon ordered and made an assessment upon them to the amount of one hundred dollars per centum of the par value of the shares held by them respectively. On the same day the receiver notified Mrs. Hitz of this assessment and requested payment of \$50 on each share of her stock within 30 days, and \$50 more within 60 days, and these payments not having been made, the receiver instituted this suit against Mrs. Hitz, to recover the sum of \$20,000.

The defendant filed pleas: 1. That she was never indebted; 2. That she never owned or held any stock of the German American National Bank; 3. And that she is, and has been, since August 5, 1856, a *feme covert*.

To the third plea, plaintiff replied that the stock was the property of the defendant, owned by her in her own right, with the consent and permission of her husband.

The defendant, by leave, filed a fourth plea, denying the existence of such a corporation as the German American National Bank.

At the trial the court directed a verdict for the defendant.

The first question made in argument here, relates to the legality of the conversion of the savings bank into the national bank. It is maintained for the defence that there is no authority of law for such conversion.

Section 5154, Rev. Stats., enacts :

"That any bank incorporated by *special law*, or any banking institution organized *under a general law of any State*, may, by authority of this act, become a national association," &c.

This applies in terms, only to banks *in the States* where they are organized under general laws, and if the term "*special law*" is not confined to State laws, it would not embrace the case of a bank organized under a general law of Congress, as was the case with the German American Savings Bank of this District. But by act of Congress of June 30, 1876, it was enacted that :

"All savings or other banks, now organized, or which shall hereafter be organized in the District of Columbia under any act of Congress, which shall have capital stock paid up in whole or in part shall be subject to all the provisions of the Revised Statutes, and of all acts of Congress applicable to national banking associations, so far as the same may be applicable to such savings or other banks ; provided, that such savings banks now established shall not be required to have a paid-up capital exceeding one hundred thousand dollars."

It might be a question whether this act does not, by its own operation, and without the necessity of any action by the banks, convert them at once into national banks, or, at least, engraft upon their charters all the features of a national bank, not inapplicable to or inconsistent with them, of which the individual liability of shareholders would be one.

Such has not been the practical interpretation of the law, but it has been supposed, at least, to authorize the conversion of the banks in this District into national banks, and this interpretation has been acted on repeatedly.

It is maintained here, however, that the provision in the banking act for the conversion of other banks into national banks is not applicable to *savings banks*.

The reasoning on the subject is entirely theoretical and founded on the difference in the objects and operations of the two kinds of banks. The question, however, will have to be determined by an interpretation of the acts of Congress, and it seems to us to be very clearly determined by the proviso, above cited, in the act of June, 1876, taken in connection with the prior acts.

The banking act provides, with reference to associations *originally* organized under it, "that no association shall be organized under this title with a less capital than *one hundred thousand dollars.*" (Sec. 5138 Rev. Stat.)

Section 5154, which provides for the conversion of existing banks into national banks, enacts that, "no such association shall have a less capital than the amount prescribed for associations organized under this title."

A capital of \$100,000 was made a condition precedent to the original organization of a national bank, and to the conversion of another bank into one. The requirement of such a capital by the act is for no other purpose, and has reference to no other object

Then the proviso in the act of June 30, 1876, that such *savings banks, now established* (*i. e.*, in this District), shall not be required to have a paid-up capital exceeding one hundred thousand dollars necessarily assumes and implies that the conversion feature in the national banking act, which requires such capital, would be applicable to such savings banks in the District of Columbia. It would have, otherwise, no meaning. It is substantially an enactment, that the laws relating to national banks, including the *conversion provision*, shall be applicable to savings and other banks in this District, except that savings banks *now existing* shall not be obliged to have a capital of \$100,000 in order to be converted into national banks.

We are satisfied, therefore, that it was competent for the German American Savings Bank to avail itself of the provision in the law for conversion into a national bank.

And the certificate of the comptroller of the currency is conclusive, according to the decision of the Supreme Court

in *Casey vs. Galli*, 94 U. S., 673, as to the regularity of the proceedings by which that conversion was effected.

We may add, that according to the same decision, where a shareholder of a corporation is called upon to respond to a liability as such, he is not permitted to deny the existence or the legal validity of such corporation. It is not, therefore, open to the defendant to rely upon this defense, if she is in the position of an ordinary shareholder in this bank.

Mrs. Hitz was a shareholder in the Savings Bank, as far as the books and transfers show. Excluding Mrs. Hitz, the owners of more than two-thirds of the stock consented to the conversion into a national bank and such conversion, according to the statute, took place without reference to her concurrence. She then became entitled to an equivalent amount of stock in the national bank. It would perhaps have been more regular for a new stock book to be opened and new certificates to be issued in the name, of the national bank. There is, however, nothing in the law, prescribing the form of the stock book or of the certificates of stock, and we see nothing to prevent the new bank from treating the old books and certificates as sufficient evidence of title in the new concern. Neither the rights nor liabilities of the stockholders could be effected by the mere omission to issue a new form of stock certificate to them. To hold otherwise would be to allow all the stockholders to escape liability, by the mere omission of the formality of issuing the shares in a new form.

All this is clear enough when applied to shareholders in the savings bank, who were, *sui juris*, capable of consenting and who actually did consent to the change.

But suppose the case of a shareholder who did not consent, or was not capable of consenting, to the conversion, and who did not, in fact, receive any certificate of stock in the new bank. Although, without his consent, the legal metamorphosis of the bank might be complete, could he be properly considered a stockholder in the new bank? For example, Mrs. Hitz, received no certificate of stock in the new bank, nor is any act of hers shown in connection with it, after its

organization. If she became a stockholder in it at all, it must have been in virtue of her consent that her original stock should be converted into stock of the national bank. If she could consent to this, she was as much a stockholder in this new bank as the other original shareholders of the savings bank, notwithstanding any omission to issue new certificates. If not, it would be difficult to make out her membership in the new concern. How far, then, was she capable of giving that consent?

As to part of this stock, to the amount of \$2,700, it was, *prima facie*, acquired during marriage, otherwise than by gift or conveyance from her husband. It may be that he paid the consideration for it, and that it was really his gift, but that is not the present aspect of the case.

As to this much of the stock, then, under the Married Woman's Act of 1869, her right to it was as absolute as if she were unmarried; she could convey, devise and bequeath it in the same manner and with like effect as if she were unmarried, and might contract, sue and be sued in her own name, in all matters having relation to it, in the same manner as if she were unmarried. If so, she could consent, like a *feme sole*, to its conversion into national bank stock, and take that in exchange for it, with all the incidents of such ownership.

We have little difficulty, then in holding upon the present showing, that *quoad* this stock, the defendant was a *feme sole* and *sui juris*, and is amenable to all the consequences of its ownership and conversion which a *feme sole* would be, including the liability asserted in this action.

The larger part of the savings bank stock was transferred to the defendant immediately by her husband.

We see no legal difficulty in the way of the husband's making this transfer, so as to vest the legal title to his wife.

With his assent, she might acquire title by purchase from strangers, and except where it interferes with the rights of his creditors, there is no reason why he may not transfer the legal title to any of his property into her name, except that

at common law a conveyance of realty could not be made directly from him to her. He, however, may have his own shares of stock cancelled and new ones issued to his wife, and her title will be the same as if they were derived from a stranger. She has the legal capacity to receive gifts, may be the obligee of a bond or receive a transfer of stock in moneyed corporations, and this, though the consideration may have proceeded wholly from the husband, and in such case she may hold against the legatees and heirs, but not against the creditors of the husband. *Fisk vs. Cushman*, 6 Cush., 20. If, however, this property is *not given to her sole and separate use*, which I assume to be the case here, because there is nothing to indicate the contrary, it would still be subject to the husband's common law rights. Stock of an incorporated company is a chose in action. The husband has but a qualified property in it—a right to reduce it to his possession by transferring it into his own name or selling it. A mere collection of the dividends would not be a reduction to his possession of the principal. *Burr vs. Sherman*, 3 Bradf., N. Y., 85.

But until it is reduced to his possession it remains the wife's property, and survives absolutely to her, on her husband's death before her.

But, on the other hand, the wife cannot, during coverture, transfer her own choses in action of her own motion. And if Mrs. Hitz undertook, on her own responsibility, to convert her shares of savings bank stock, given to her by her husband, into national bank shares, all which involves a transfer of choses in action, in which the husband has a qualified property, it would probably have to be held a void proceeding.

Yet it must be deemed settled law that a wife may transfer her choses in action, with the consent of her husband.

It has been held, for example, that a bill of exchange or promissory note, payable to a married woman, may be endorsed in her own name, and the title passed, with the husband's consent. *Menkins vs. Hernight*, 17 Mo., 287; *McLain vs. Weidmeyer*, 25 Mo., 364.

A transfer in exchange for other choses in action would seem to be clearly within the same rule.

If, therefore, Mrs. Hitz acted with her husband's consent, in agreeing to convert her savings bank stock into national bank stock, of which the fact of their uniting in the same power of attorney, for that object, would seem to be evidence, we have a regular and legal acquisition by her of the stock of the German American National Bank.

Does the usual consequence of that ownership devolve upon her, as to that part of the stock which she holds, only as a married woman would hold it, at common law, *i. e.*, the personal liability to be assessed for losses to the amount of the par of the stock?

Section 5151, Rev. Stat., provides that: "The shareholders of every national banking association shall be held individually responsible, equally and rateably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof."

We can conceive a state of facts to which this would not apply, even where one is a nominal shareholder. If, for instance, the stock had been transferred to Mrs. Hitz, and the subsequent change made in the bank without her knowledge or consent, it would be a very forced construction of the law which would extend it to such a case. But we assume for the argument, that the contrary was the case, since evidence was admitted without objection, tending to show that she received dividends on the stock and consented in writing, as a stockholder, to the change.

The statute contains no exception, in terms, in favor of married women. It seems hard, and therefore difficult to conceive that Congress intended that a married woman, acquiring her stock, it may be under marital influence, and also unable to alien it herself, should yet be held liable, in consequence of that ownership, to make good, out of her other estate, losses resulting from failure of the bank.

Yet we find even a harder case clearly enacted in the statute:

"Persons holding stock as executors, administrators, guardians or trustees, shall not be personally subject to any liability as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in such trust funds would be if living and competent to act and hold the stock in his own name." Sec. 5152 Rev. Stat.

So that a young ward, whose guardian invests in national bank stock, without his knowledge or consent, and even where he is incapable of assenting at all, is liable, in his other estates under the individual liability clause in the statute.

This very difficulty was considered by the Court of Appeals of New York, in the case entitled, "In the matter of the Reciprocity Bank," 22 N. Y. R., 15, which arose under a statute of New York relating to State banks, similar to the U. S. statute, and in substantially identical terms.

The court said :

"The legislature, if it had thought proper to do so, might have made an exception in favor of married woman, but no such exception was made. It is said that Mrs. Lansing, being under the disabilities of coverture, could not make a transfer of her shares and so avoid this liability, if she had wished to do so. This is a circumstance which might have been properly addressed to the legislative discretion if, indeed, the legislature had any discretion, under the injunction of the constitution, but it does not authorise the courts to allow an exemption, where neither the constitution nor the law has declared any. It is also said that *femes covert*s are not liable to suit at common law; and, in general, this is true. It is also true that the apportionment of liability among stockholders in banks, when duly confirmed, becomes a judgment against each stockholder, to be enforced by execution as in other cases. But it was competent for the legislature to depart from the rules and analogies of the common law, and to make married women and their estates liable in this proceeding as other shareholders in banks are made liable. This, we think, has been done, in order to

effectuate the policy in which the constitutional provision and the statute are founded. It might go far to defeat that policy, if married women could take and hold stock without liability to creditors."

In the same case, in the Supreme Court of New York, reported in 29 Barb., 382, it had been laid down that "married women could own stock in bank in their own right both at common law and under the statute of 1848 (of New York), and the legislature had the power to alter the common law so as to make them personally liable to the amount of their stock. It has thought proper to do so, and we are bound in this, as in all other cases, to enforce their liability."

In the case of *Anderson vs. Line*, in the U. S. Circuit Court for the Eastern District of Pennsylvania, reported in 14 Fed. Reporter, 405, it appeared that shares of stock in a national bank were transferred by a husband directly to his wife, as in this case, and that suit was instituted against her and her husband. And the court held that the coverture did not exempt her from the liability imposed by the national currency acts upon all stockholders in national banks.

So that, whatever authority exists on this question is all in the direction of the *feme covert's* liability. It is obvious, as suggested in the New York case, that to maintain an exemption of married women from liability would greatly facilitate an evasion of the individual liability clause and the practice of frauds against creditors. It would only be necessary for husbands to put the stock in the names of their wives.

Again, sec. 5139 provides that a transferee of stock shall succeed to the rights and liabilities of the prior holder. If a married woman transfers the stock, and she is not liable, it might be held that her transferee is equally exempt. These are some of the serious difficulties in the way of sustaining the exemption of married women as shareholders.

In a general way, some of the cases speak of the liability of the shareholder as a *contract* liability, from which its non-existence is argued in favor of persons not competent to contract to assume that liability. But it will be found that the

terms "*contract liability*" are used in the sense of being a liability which will survive against the estate, instead of dying with the person, as would a liability for a mere tort. In our view, however, and that is evidently held in the case already referred to, it is a liability imposed by statute, as an incident to the ownership of the stock, and attaching to all who are capable of that ownership, and without reference to any supposed voluntary assumption of the liability by express or implied contract. And as this is a statutory and not a common law liability, imposed upon the *feme covert* as a shareholder, it seems to us, as was also held in 29 Barbour, *supra*, that it affects her alone, and we think that suit is properly brought against her without joining her husband, which would be necessary in the enforcement of any common law obligation or liability of the wife.

The court below having held the wife's coverture a protection to her, it follows from the views before stated, that a new trial must be ordered.

JOHN CAMPBELL, Administrator of Stephen S. Springer,

vs.

NATHANIEL WILSON.

LAW. No. 22,986.

{ Decided May 23, 1883.

{ Justices HAGNER, COX and JAMES sitting.

1. As long as a fund is held professedly and admittedly as a trust, no lapse of time precludes the beneficiary from claiming it. But the moment there is some breach of duty or adverse claim by the trustee, the statute commences to run.
 2. It is doubtful whether the law of trusts, as a bar to the Statute, applies to the case of money collected by an attorney for his client, since such moneys are not intended to be held in trust, but are to be paid over promptly.
 3. When an administrator founds a claim upon a contract made by himself, although it relates to the estate he represents, he may sue upon the contract in his own name. Whether he may also sue on such a contract in his representative character, *quære*.
 4. When one is barred by the Statute of Limitations from suing on a contract in his own name, he cannot remove the bar by taking out letters of administration and suing in his representative character.
 5. As a general rule, when the Statute of Limitations begins to run, no subsequent transfer of title to the cause of action arrests its operation, thus if it has commenced to run against a party in his lifetime, it continues to run against his administrator; if it has commenced to run against an administrator, it will continue to run against the administrator *de bonis non*, &c.
 6. An action for money had and received cannot be sustained unless it be shown that when the money was received it was *ex æquo et bono* the money of the plaintiff claiming it, and that it was received at the time for his use.
 7. By an express contract, money was received by W., an attorney, for C., the latter being an administrator appointed in Florida. The attorney alleged an assignment of the fund and refused to pay it over. More than three years afterwards C. took out letters here and described himself as administrator under the laws of this District, and brought an action against W. for money had and received.
- Held*, That although the money was not payable to C, as administrator here, his description of himself as such might be rejected as surplusage, and, but for the Statute of Limitations, a recovery allowed in his individual name.

THE CASE is stated in the opinion.

F. P. CUPPY and JOHN J. WEED for plaintiff.

WORTHINGTON & HEALD for defendant.

Mr. Justice COX delivered the opinion of the court.

This is an action by John Campbell, calling himself administrator of Springer, appointed as such by the Supreme Court of the District of Columbia, against Nathaniel Wil-

son. The substance of the declaration is that the defendant, as attorney and counsellor of the plaintiff, on the 26th of October, 1876, collected from the United States the sum of \$9,225, being a claim held by his intestate against the Government, and that the defendant, as to \$2,000 of that amount, retained the money for his own use and refused to pay it over. The declaration also contains the common counts. The defendant pleads the general issue and the statute of limitations. Further notice of the pleadings will be taken presently. At the trial several exceptions were taken by the plaintiff, only one of which it is necessary to notice. That states that while the defendant was under cross-examination the court arrested the trial of the case and decided that, as matter of law, upon the facts then proved, the plaintiff was not entitled to recover, and instructed the jury to return a verdict for the defendant. It may be well to say a word as to the proof upon the merits. The defendant testified that the plaintiff gave an order on him to pay S. P. Brown \$2,000 out of the proceeds of this claim when collected, and Brown gave a further order in favor of Stanton & Worthington for \$1,000 to be paid out of his \$2,000; that the defendant accepted the orders and paid them when the money was received. The plaintiff's attorney, on the other hand, testified that he simply gave an authority to the defendant Wilson to pay the \$2,000 to Brown, but that Brown having failed to render any service for it, he revoked the order and claimed the payment of the amount from Wilson which was refused. If the case has to be decided upon its merits, it will depend upon the question which of these two contradictory statements is correct, and the court was wrong in taking that question from the jury. Let us consider then how the case is affected by the defence of limitations. And here I again refer to the pleadings. To the plea of limitations the plaintiff replies that the sum of money in controversy came into the defendant's possession as the attorney of the plaintiff, and that the defendant holds such sum of money as trustee for the plaintiff, and is not protected in holding it by reason of the statute of limitations. The defendant rejoins to this

that, on the 26th of October, 1876, the plaintiff knew he had the money and demanded payment of it, and defendant refused to pay it then and ever since. On this the plaintiff takes issue; so that the only question of fact in this connection presented on the pleadings, is whether the demand was made on Wilson on the 26th or 27th of October and payment was then refused. The plaintiff's witness, Charles Campbell, who was his attorney in fact, testifies that on or about the 26th of October, 1876, he notified the defendant not to pay \$2,000 to Brown, and demanded payment of it to himself, as agent of the plaintiff, and that the defendant, then and continuously since, refused to accede to the demand. The defendant testifies to the same effect; so that on the only issue of fact made in connection with the statute of limitations, the evidence is all one way, and that on both sides is in favor of the defendant. What then is the law on this subject? It is true that if one holds a fund professedly and admittedly as trustee, no lapse of time precludes the beneficiary from claiming that fund, because no cause of action arises, and therefore he is not in default for not suing, until some breach of duty or adverse claim by the trustee; but from the moment when that adverse position is taken by the trustee the statute commences to run. It may be doubted whether the law of trusts applies to the case of money collected by an attorney for his client, because that money is not intended to be held in trust, but to be paid over promptly; so that from the moment the attorney fails to turn it over a cause of action arises. In this case it is clearly proved that the defendant refused to pay over this money claimed of him, in October, 1876, so that the plaintiff had a cause of action against him immediately, and the statute commenced to run against him from that time. Both the law and undisputed facts, therefore, were with the defendant, and the court committed no error in taking the case from the jury; the facts clearly showing a perfect defence to the action.

A peculiarity of the case is that the pleadings present one issue and the argument an entirely different one; and it

may be well to notice the positions taken in the argument.

It was maintained for the plaintiff that, although he was administrator in 1876, when the cause of action accrued, yet he could not sue in this District by virtue of his Florida letters of administration, nor until he took out letters here in February, 1880, and that the statute began to run against him only from the latter date, and the action was brought in ample time after that, viz., in July, 1881.

Now, the law is very well settled that when an administrator founds a claim upon a contract made by himself with a party, although it relates to the estate he represents, he may sue upon the contract in his own name. The English books hold, that if the money, when received by him, will be assets of the estate, he may also sue in his representative character. Some American cases throw a doubt over this last question, and hold that he must, under such circumstances, sue in his individual name. It is plain then, that this plaintiff, Campbell, who employed Wilson to collect this money, had a right to sue in his own name in this District as soon as the money became due him, if there was any such indebtedness, and the statute began to run against them then. Does it make any difference that he afterwards took out letters of administration here? Does that give a new start to the Statute of Limitations and enable him to sue in the character of local administrator even after he has been barred from suing individually? If so, it would be contrary to the analogies of the law. As a general rule, when the statute has once begun to run, no subsequent transfer of title to the cause of action arrests its operation. Thus, if it has begun to run against a party in his lifetime it continues to run against his administrator; if it has begun to run against an administrator, it will continue to run against an administrator *de bonis non*, &c. But in this case, *a fortiori*, it ought to continue, because there has been no transfer of title even, but the same person has held the cause of action all the time, and the most that he can say is that he has acquired the right to sue in either of two ways, instead of only his individual name, as at first. There has been no new

cause of action. That has remained the same all the time. It is the same case as if the act of 1812 was still in force and the plaintiff had the right, as administrator under the Florida laws, to sue here, and should take out local letters here also, with a view of protracting the period within which he could sue.

Another question suggests itself, viz., whether, if the administrator here were a different person from the plaintiff, he could institute a suit here at all. Could he maintain it under the special count? In this, the declaration avers that Wilson received this money as attorney and counsellor for the plaintiff. The proof is that he received it as attorney and counsellor for another person three years and more before the plaintiff existed as administrator. The proof would clearly not sustain the special count in the declaration. How is it as to the common counts? The only one available would be the count for money had and received. If Mr. Wilson had collected this money in the lifetime of the deceased, or after his death, under a contract had with him in his lifetime, or had collected it without any authority, the law would call it money had and received for the use of the deceased, or his administrator as such, and perhaps any administrator who could give a discharge might sue for it as money had and received.

But when it appears that the money was received under an express contract with the Florida administrator, and expressly for his use, how can it be money had and received for the use of an administrator appointed more than three years afterward? The action for money had and received cannot be sustained unless it be proved that when the money was received it was *ex æquo et bono* the money of the plaintiff claiming it, and that it was received at the time for his use. It is plain, therefore, that this money could not have been received for the use of this local administrator. The express contract by which it was received for the Florida administrator excludes any implied promise to pay to any other person. The former, if anybody, had a right of action for it, and it cannot be due to two different persons. It does not,

therefore, appear that if another person than the plaintiff were administrator here he could have maintained the action. The plaintiff, then, does not benefit himself by describing himself as administrator under the laws of the District. That might be rejected as surplusage, and he might recover as an individual if there were no bar to that recovery ; but as an individual he is clearly barred by the defence of limitations.

The judgment is therefore affirmed.

LAMONT vs. THE WASHINGTON & GEORGETOWN R. R. Co.

{ Decided October 15, 1883.
{ The CHIEF JUSTICE and Justices HAGNER and COX sitting.

1. Before judgment, the parties to a pending suit may settle it between themselves without considering either the wishes or the interest of the attorneys.
2. Plaintiff brought an action of tort to recover damages for injuries received. Pending the suit, plaintiff and defendant, without the knowledge of plaintiff's attorneys, settled the case. Plaintiff then gave defendant an order on the clerk of the court to dismiss the suit, which being filed, plaintiff's attorneys moved the court to set the cause down for trial notwithstanding, on the ground that the settlement was collusive and was made with knowledge on the part of the defendant that the plaintiff's attorneys were interested in the case to the extent of their fees for services. An affidavit accompanied the motion showing that the plaintiff had agreed to pay his attorneys a contingent fee of thirty-three per cent. of the amount that should be recovered. The court thereupon passed an order that defendant should pay to plaintiff's attorneys one-third of the sum for which the case had been settled, and in default thereof the entry of dismissal should be struck out and the cause set down for trial. On appeal this court reversed the order, *holding*:
That the court will not interfere to enforce in a summary way through the original suit, the collateral engagement of a client for the compensation of his attorney, but will leave the latter to his common law remedy.
3. Whether the order of the court below was an appealable order, *quære*.

THE CASE is stated in the opinion.

HENKLE, MCPHERSON AND HINE for plaintiff.

DAVIDGE AND TOTTEN for defendant.

Mr. Justice COX delivered the opinion of the court.

This case, as is very well known, was an action brought to

recover damages, for injuries alleged to have been suffered by the plaintiff in being forcibly and wrongfully expelled from the cars of the defendant.

The case was tried three times, and on the last trial, the jury rendered a verdict for the plaintiff for fifteen thousand dollars. The case came, in the usual form, before this court on a motion for a new trial on bills of exceptions. It was argued by counsel, and while under advisement, the defendant settled with the plaintiff by paying him two thousand dollars, and received from him a release of all claims and demands, and an order to the clerk of this court to enter the case dismissed. This was done without the knowledge of the plaintiff's attorneys.

After this was done, the court rendered its opinion, setting aside the verdict in the case below and ordering a new trial, and then this order to dismiss was filed; and after that the attorneys for the plaintiff came into court and moved the court to set the cause down for trial, notwithstanding the paper filed by the defendant purporting to be an acknowledgment that the case had been settled, on the ground that said pretended settlement between the plaintiff and the defendant was collusive, and with the knowledge on the part of the defendant that the plaintiff's attorneys were interested in the case to the extent of their fees for services, and that knowledge of such settlement was being concealed from them by the plaintiff.

The motion was accompanied with an affidavit showing that the plaintiff had agreed to pay his attorney, Mr. McPherson, a contingent fee of 33 per cent. of the amount that should be recovered.

The court thereupon passed a peremptory order that the defendant should pay to plaintiff's attorneys one-third of the sum of two thousand dollars, and that, in default thereof, the entry of dismissal should be struck out and the case set down for trial. That order was appealed from and that appeal has been the subject of discussion before us.

In the argument here it was claimed, on the part of the attorneys for the plaintiff, that they had a lien on the cause

of action, and that the court could enforce it by allowing the suit to proceed to trial for the benefit of the attorneys where it had been adjusted between the parties collusively with a view to cheat the attorneys out of their compensation. Upon the other hand, it was claimed by the defendant that, before judgment, the parties to a pending suit have entire control of the subject-matter, and may settle it between themselves without reference to either the wishes or the interests of the attorneys.

The common law recognizes the lien of an attorney upon moneys of his client in his hands, and, also, upon papers and documents in his hands, whether they be muniments of title, or causes of action, or evidence ; but there is no such thing as the lien of an attorney upon a mere claim or cause of action which his client has against a third person, apart from the tangible vouchers of the claim which may be in the attorney's possession. The very essence of the common law lien is *possession*. The party who has a lien loses it the moment he surrenders possession ; and possession cannot be predicated of a mere abstract right in another person. It is conceded on all hands that the parties, before judgment, may compromise and settle between themselves without reference to the attorney ; which could not be the case if the attorney could be regarded as having *possession* of his client's cause of action. When the cause is once reduced to judgment, however, it is governed by different principles. While a suit is pending, the cause of action may be compromised and settled by the parties out of court ; but when reduced to judgment, it can only be settled by an entry of satisfaction on the record ; and the person ordinarily recognized as having authority to enter that is the attorney of record ; so that he has control over the judgment, and in a sense of the word, which may be somewhat strained, he may be said to have *possession*. At all events, the courts have so far recognized it that they allow the attorney a lien on a judgment or an award rendered under the order of the court. In England the practice arose of enforcing these liens of the attorney by a peremptory rule on the defendant, where he

had collusively settled with the plaintiff, to pay the attorney his costs.

Then, if the the case of the attorney here has any legal foundation, it cannot be on the ground that he has a lien on the cause of action ; it must be put upon some other ground. It is maintained, however, that the courts have so far recognized the rights of the attorney, in such cases, that if a settlement takes place between the parties without reference to his interests, they will allow the cause to proceed to trial for his benefit, to the extent of his claim for compensation.

A number of cases have been cited upon this question which we think have been largely misapprehended. Almost all the cases have been cases of judgments. All the English cases have been cases where, the suit having been reduced to judgment, the lien of the attorney has attached. The only case which is supposed to differ from the others in that respect is the case of *Swain vs. Senate*, 5 B. & P., 99.

In that case the defendant was arrested and gave bail, and afterwards left the country. The bail afterwards, without the knowledge of the plaintiff's attorney, settled the case with the plaintiff. Then the attorney proceeded to take judgment by default against the defendant, and that judgment was not impeached or attacked in any way ; so that it was in the condition in which the lien attached. Then he issued a *scire facias* against the bail, and the court did allow that proceeding to go on for the benefit of the attorney to the amount of his costs.

But, as we have said, that was a case where the claim had been reduced to judgment, the condition of things in which the courts had always allowed the lien of the attorney to attach.

American cases have been also referred to here, all of which we have examined ; and we find there is only one of them which was a case of tort, in which the privilege of proceeding with the suit for his own benefit was allowed to the attorney after settlement between the parties, and where there was no tangible cause of action that the attorney had in his possession and control.

A case was cited from 22 Wisconsin R., 457, where a suit was brought by the attorney upon a *town order*, as it was called, and after the settlement between the parties, the attorney was allowed to proceed, upon the ground that he had a lien upon *that*, not on the ground that he had a lien at all upon the cause of action itself, apart from the evidences of it.

The only case that seems to come up squarely to the proposition that, in an action for unliquidated damages, the court will allow the suit to proceed for the benefit of the attorney, is the case of Rasquin against the Knickerbocker Stage Company, 21 Howard's Practice Reports, 292; and that decision seems to have been rendered upon the authority of Swain *vs.* Senate, which seems to have been misconceived by the court. This decision, reported in Howard and cited here, was rendered in the court of Common Pleas of the city of New York, which is not a court of last resort. But this is to be remarked about that case, and about others that seem to countenance the proposition that the court will allow a case to proceed for the benefit of the attorneys, viz., that that has never been done except to allow the attorney to secure his *legal fees and costs*; never to enable him to secure the compensation which his client may have agreed to pay him as counsel. It is necessary to note the distinction.

In the administration of the law in England, and more or less in this country also, every step taken in a case involves not only the payment of a compensation to the officers of the court, but also the earning of fees by the attorney of record. If the plaintiff recovers judgment, these fees and costs of his attorney are included in his judgment and become part of it, and as fast as they are earned, the suit becomes, to that extent, the suit of the attorney. He thereby virtually becomes a party to the suit, *quoad* his legal fees; and it is very proper that the court should say to the defendant, "you cannot settle this suit until you settle the claims of all the parties on the record," and the attorney being, *quoad* these fees, a party on the record, his fees must be provided for before the case can be dismissed. But the reason

would not apply to a collateral contract between the attorney and his client.

This present case illustrates the distinction particularly. Here is a claim for unliquidated damages, which is, in its very nature, incapable of being assigned in whole or in part to the attorney. And, in fact, the agreement which is relied upon here does not purport to assign it in any part ; but is simply an engagement on the part of the plaintiff to pay his attorney a contingent fee of thirty-three per cent. of the amount of the recovery; that is, he agrees that in case of recovery, he *personally*, will pay to his counsel a sum equivalent to thirty-three per cent. of the amount recovered. It is clear, therefore, that he might as well agree to pay a gross sum of one thousand dollars, or any other gross sum, or to convey a house and lot in case of success in the suit.

Now, in no sense can that collateral engagement of the client to his attorney be said to be involved in this suit. Here is an action for damages suffered by the client. It is not a suit to recover money stipulated in a collateral agreement to be paid by client to attorney, but it is to recover damages for injuries alleged to have been suffered by the client, and, *quod* that, the attorney cannot be interested as a party in the suit. It might as well be said that, where the client had agreed to do some collateral thing in case of the recovery of judgment, to convey a house and lot, for example, the court could, after this settlement, hold the defendant responsible for the plaintiff's engagement to convey that house and lot to his attorney. You could maintain that proposition with as much reason as that the court could compel the defendant to pay to the attorney of the plaintiff the moneys or considerations which the client had collaterally engaged to pay to his attorney. The courts will not enforce such a claim in that way. They leave the attorney to his common law remedy on the contract.

We think the whole course of the authorities is in that direction. The law is stated in the first place in Parsons on Contracts, Vol. I, p. 116, as follows : " He [the attorney] has no claim for unliquidated damages in court until after judg-

ment." The case of *Wood vs. Anders*, 5 Bush, 641, is cited, which fully sustains this proposition.

Again in *Parsons*, Vol. III, p. 269: "But the lien on the cause for his fees does not attach until the judgment is rendered. Therefore, where in a case reserved, after the opinion of the court was pronounced in favor of the plaintiff, he forthwith assigned his interest in the judgment, and the defendant, during the term and before the judgment was actually entered, paid the whole amount to the assignee; it was held that the attorney's lien was thereby defeated."

In support of this, several cases are cited, all of which fully sustain the position in the text.

Besides these, there are two cases in the New York Reports, which investigate the question very thoroughly. The first is the case of *Pulver vs. Harris*, 52 New York Reports, p. 73. That was an action for assault and battery. The plaintiff recovered a judgment, which he assigned to his attorney, to secure his costs, and notice of the assignment was given to the defendant. The defendant appealed and the decision was reversed, and before the trial the parties settled, and the plaintiff executed to the defendant a release. Notwithstanding this, the plaintiff's attorney moved the trial of the action when it was reached on the calendar, and the defendant's counsel produced the release.

The court held that the cause of action was not assignable, and that after the reversal of the judgment the assignment thereof became inoperative, so far as the defendant's rights were concerned; and that, as to him, the cause of action belonged to the plaintiff, which he could not transfer, and which remained subject to his control until merged in a judgment, or at least in a verdict. Judge Grover said: "It may be said that although the plaintiff was the owner of the cause of action, and as such had a right to control and settle the suit, yet the defendant, knowing that the attorney relied upon the fruits of the action as security for the services, ought to have paid the money to him, instead of the plaintiff, upon the settlement. The answer to this is, that the attorney, having no legal or equitable lien upon the cause of

action, the defendant had the right to pay the money to the plaintiff, to whom it belonged, and was not bound to take care of the interests of the attorney."

This case was followed by the case of *Coughlin vs. The Hudson River Railroad Company*, 71 N. Y. R., 443. That was a very similar case. There the plaintiff was injured while a passenger on the defendant's railroad. He brought suit, and executed an agreement with his attorneys to divide with them the damages that might be recovered against the defendant, and the agreement was that if nothing should be recovered, the attorneys should have nothing for their services. Subsequently, the plaintiff called at the office of the defendant attorneys, and had some negotiation with them, and made a settlement.

The court said :

"It is certainly a general rule, that parties to an action may settle the same without the intervention of the attorneys. Generally, a plaintiff who has a cause of action against a defendant may release and discharge it upon such terms as are agreeable to him. This he may do while the action is pending, and after judgment he may cancel and discharge the judgment. In all this generally he infringes upon no privilege and violates no right of his attorney.

"But since the time of Lord Mansfield, it has been the practice of courts to intervene to protect attorneys against settlements made to cheat them out of their costs. If an attorney has commenced an action, and his client settles it with the opposite party before judgment, collusively, to deprive him of his costs, the court will permit the attorney to go on with the suit for the purpose of collecting his costs.

* * * * *

"After judgment, the attorney who has procured it has a lien upon it for his costs. This lien is upheld upon the theory that the services and skill of the attorney have procured the judgment. There is, then, something upon which a lien can attach, and the courts uphold the lien by an extension to such cases of the principle which gives a mechanic a lien upon

a valuable thing which, by his skill and labor, he has produced.

* * * * *

"A person owning a judgment for the recovery of money may give his attorney, or any other person, by agreement, rights and equitable interests therein, which the defendant therein, charged with notice, must respect. So, if the cause of action before judgment be in its nature assignable, the owner of it may assign and, by agreement, create legal and equitable interests therein, and such agreement may now be made with his attorneys as well as with other persons, and when such interests have been created, and notice given of them, they must be respected. But what I maintain is that before judgment, in the absence of any agreement, the attorney has not now and never had any lien upon, or interest in the cause of action; and when the cause of action is like this, such as by its nature is not assignable, the party owning it cannot by any agreement, give his attorney, or any other person, any interest therein."

In *People vs. Tioga C. P.* 19 Wend., 73, Cowen, J., said :

"Assignments of personal injuries must still be regarded as mere covenants or promises which we cannot directly protect against the interference of the immediate party, though the defendant have full notice of the effort to assign. If the person professing to assign will do prejudice to the right by extinguishing or impairing it, the party with whom he deals must be left to his action for damages according to the nature of the undertaking. Mere personal torts of this kind cannot be separated from the person upon whom they are inflicted and they die with him.

"Here there was not even any agreement by plaintiff to assign any portion of the claim to his attorneys. The agreement executed did not purport to give them any present interest in the cause of action. It was simply an executory agreement that the attorneys should share in the damages recovered, the cause of action remaining intact in the plaintiff. Still an agreement to divide the recovery in such a

case would attach itself to the judgment when recovered, and give the attorney an equitable interest therein.

It is, therefore, beyond dispute, that the plaintiff's attorney had neither a legal nor an equitable interest by way of assignment or lien on the cause of action. The defendant was not asking any favor of the court. It was in court simply insisting upon its settlement with the plaintiff as a defence to his cause of action. Therefore, if the attorneys are entitled to the protection they now seek, it is only by the exercise of the extraordinary power of the court, to which I have first above alluded, and I am prepared to say that such power should not be exercised in a case like this. It has not been conferred upon the courts by statute, usage or common law. Its exercise to secure to an attorney the statutory fees, small in amount and easily ascertainable, was just and proper, and could lead to no abuse. But to exercise it so far as to enforce all contracts between clients and attorneys, however extraordinary, is quite another thing. Here the attorneys were contractors. They took the job to carry this suit through, and to furnish all the labor and money needed for that purpose, and they are no more entitled to the protection which they now seek than any other person not a lawyer would have been if he had taken the same contract. When a party has the whole legal and equitable title to a cause of action, public policy and private right are best subserved by permitting him to settle and discharge that, if he desires to, without the intervention of his attorneys."

This case has been followed up since by the case of *Kusper vs. The city of Beaver Dam*, in Wisconsin, in 1881, which is found reported in a late number of the *Northwestern Reporter*. That was an action for personal injury, in which the facts were to a very large extent the same as in the cases I have just cited, and those cases were referred to and the decisions reaffirmed by the court in Wisconsin.

But enough has been said to show that all the cases hold uniformly that the court will not interfere to enforce in a summary way, through the original suit, the collateral engagements of a client for the compensation of his attorney.

We are certainly as desirous as any court could be to protect the members of the bar in their relations with their clients, but it clearly seems to be, if not beyond the power of the court, certainly a practice not sustained by any authority or precedent, to enforce an engagement of this character in a summary way ; the court will leave the attorney to his common law remedy, and, therefore, we are compelled to reverse the order of the court below and to allow the order of settlement to stand.

There was a question suggested in the consultation in this case as to whether the order appealed from was an appealable order. We wish not to be committed to any decision on that question. We are satisfied upon the merits of the case that the order below ought to be reversed.

BENJAMIN U. KEYSER, Receiver, vs. JOHN HITZ ET AL.

EQUITY. No. 6,583.

{ Decided October 29, 1883.

{ The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

1. The powers of the directors of a national bank are not regulated by the strict principles of a special trust. They act in a fiduciary capacity, but are clothed by the statute with a power to manage the affairs of the bank, and this implies a considerable element of discretion.
2. It is not an improper exercise of that discretion, where cash is needed for the legitimate business of the bank, to accept anticipated payment of a debt bearing a high rate of interest where such debt constitutes an unavallable asset.
3. Where a bank, under a contract made by its officers, receives money for the purpose of being applied by it to certain uses, such money cannot be retained by the bank except in accordance with the contract under which it was received, although its officers exceed their powers in making the contract. The money comes into its hands charged with a trust and the retention of it constitutes an acceptance of the trust, and at the same time a ratification of the acts of its officers.
4. Where, as part of an arrangement by which a loan is to be secured on real estate, a conveyance of the premises is made, that arrangement will, of itself, supply the consideration for the conveyance.

STATEMENT OF THE CASE.

In January, 1876, the German American Savings Bank of the District of Columbia took, for value received, two notes of \$10,000 each, dated January 5, 1876, payable respectively one and two years after date, with interest at the rate of 10 per cent. per annum, payable semi-annually, drawn by one Wm. R. Chipley, to the order of E. P. Halstead, trustee, and by him endorsed. These notes were discounted or loaned upon realty for the benefit of John Hitz, then president of the bank. They were secured by a deed of trust to R. B. Donaldson, a director, and C. E. Prentiss, the cashier, of the bank, upon a piece of property situated at the corner of Ninth and G streets, N. W., Washington city, executed by John Hitz and his wife, Jane C. Hitz. The property was acquired by Mrs. Hitz by inheritance, subsequent to her marriage and prior to the passage of the Married Woman's Property Act. The deed provided for a release of the property, on the satisfaction of the debt, to John Hitz, and contained the usual provisions for sale in default of payment.

The loan was numbered on the bank books, "Loan 570," and interest was paid from time to time.

In May, 1877, the German American Savings Bank was converted into the German American National Bank, this loan forming part of its assets.

In June, 1877, Mr. P. Jenks, of Philadelphia, entrusted R. W. Tyler, of Washington, with loaning \$20,000 in that city. Capt. Tyler, in his negotiations, consulted Mr. Hitz about a proposal he had received, and the result was an arrangement by which the money was to be loaned upon the property in question upon a first encumbrance at 8 per cent. per annum interest. The negotiations were conducted between Capt. Tyler, Mr. Hitz and Dr. Prentiss, and in the course of them it was agreed that the prior deed of trust should be released, and a conveyance of the fee made to Miss S. L. Crane, who should appear as the new borrower, and execute the new deed of trust.

The examination of the title and the preparation of the new deed of trust were entrusted by Tyler to Ashford and Hopkins, Prentiss undertaking to prepare the release of the Chipley trust and the conveyance to Miss Crane.

By the release the property was conveyed back to Mrs. Hitz, and the deed to Miss Crane was, as first drawn, from her solely. Subsequently, it was changed, so as to include her husband also. The date of this change, whether before or after execution and acknowledgment by Mrs. Hitz, was one of the most contested questions in the case.

The papers were completed about the 20th of June, 1877, and Tyler delivered Jenks' duly certified and endorsed check for the money to Prentiss at the bank. Prentiss endorsed the check, as "cashier," to the credit of the German American Bank, at its Philadelphia correspondent, and subsequently as "C. E. Prentiss," and to the credit of an account kept by him with the German American Bank as "Account No. 573," under the name of "C. E. Prentiss, trustee."

The books of the bank did not show any payment of the Chipley notes until June, 1878, when one was entered as paid on the 6th and the other on the 22d. Meanwhile, they

had figured as assets of the bank. The books also showed an entry under date of October, 1878, "Loan 570 Ret'd," as a discount, and under date of October, 1878, a payment thereof.

The bank failed, and closed its doors October 30, 1878, Keyser taking charge as bank examiner on the 31st, and on the 1st of November as receiver.

The Chipley notes were claimed by the receiver as assets, and on the — of December, 1878, Miss Crane wrote on their back a guarantee of them, and executed a deed to Keyser of the reversion in the property in question to secure their payment. He declined to pay the instalment of interest due on the Jenks loan, and Tyler advertised the property.

Thereupon, the plaintiff filed his bill, asking an injunction to prevent the sale; discovery by Jenks and Tyler of their connection with the case; reinstatement and priority for his benefit of the trust deed to Donaldson and Prentiss; if this were refused, a personal decree for the amount of the Chipley notes against the defendants; the establishment of a lien in his favor upon all the real property of the defendant Hitz; and a sale of the property in question to satisfy his claim.

Full answer was made by the defendants, and Miss Crane and Mrs. Hitz filed cross-bills. The former charged that her guaranty of the Chipley notes and her deed to Keyser were unadvised and without consideration, and asked their cancellation.

Mrs. Hitz charged that the whole transaction was a fraud upon her, and asked that all the deeds of trust, &c., involving her property, be set aside. Subsequently, she filed an amendment to her cross-bill, charging that the deed to Miss Crane, purporting to be made by her and her husband, had been altered so as to include her husband as a party after its alleged execution by her. The further facts necessary to an understanding of the case appear in the opinion of the court.

On the hearing of the case in Special Term, a decree was made denying any relief to Keyser, cancelling the Crane deed to him, and her guaranty of the Chipley notes, and holding the trust deed to Tyler to be valid only as to John Hitz's interest in the property.

Keyser, Mrs. Hitz, Tyler, and Jenks, appealed.

R. K. ELLIOT and L. ROBINSON, for Keyser, contended :

That the deed of trust of January 26, 1875, to secure the Chipley notes, was valid and subsisting ; that the subsequent deed, purporting to have been from Hitz and wife to Miss Crane, was never fully executed, as Mrs. Hitz never expressly or by implication consented to its being put on record. See *Armstrong vs. Morrill*, 14 Wall., 120 ; *Adams vs. Adams*, 21 Wall., 185 ; *Younge vs. Gilbeau*, 8 Wall., 641 ; *Parmeler vs. Simpson*, 5 Wall., 86 ; *Maynard vs. Maynard*, 10 Mass., 458 ; *Samson vs. Thornton*, 8 Met., 281 ; *Merriam vs. Leonard*, 6 Cush., 151 ; *Brabrook vs. Savings Bank*, 104 Mass., 231 ; *Chase vs. Breed*, 5 Gray, 442.

Nor can it be shown to the court that, in the forum of conscience, the trust to secure the Chipley notes, though never legally released, should be released. The Chipley notes of themselves do not indicate payment ; they figured as assets of the bank, and were shown as such on several occasions to the bank examiner. The Jenks money was not paid to the bank, but went to the credit of the private account of "C. E. Prentiss, trustee," and the notes themselves were unhesitatingly transferred to the receiver as assets. The negotiation of the Jenks loan was in the interest of private parties, enured to the benefit solely of John Hitz, and was an injury to the bank by reducing the interest from 10 per cent. per annum to 8 per cent. If Tyler, in advancing the Jenks money, was paying off the Chipley notes, he should have seen that they were produced and cancelled, as very many authorities show. But he went according to his own showing to pay them with an amount insufficient. There was due on them interest for nearly six months, and yet he paid only the principal. Such a payment is no payment. The trustees of the security for the Chipley notes could not release except on full payment. They must follow strictly the charter of their authority. See *Clark vs. Maguire*, 16 Mo., 802 ; *Richardson vs. Sharpe*, 29 Barb., 222 ; *Young vs. Benthuyssen*, 30 Tex., 762 ; *Griswold vs. Perry*, 6 Lans., 98 ; *Cassell vs. Riss*, 33 Ill., 259 ; and many other similar authorities.

All persons taking property agreed to be taken as security, take it impressed with the trust.

In this case, the release by Donaldson and Prentiss being in contravention of the trust, is absolutely void, and the estate remains in the hands of the original trustees for the original purposes of the trust. *Eustice vs. Holmes*, 52 Miss., 305.

The property of the stockholders of the bank of which the plaintiff is the receiver, is not bound by the irregular transactions, or the declarations of its officers, beyond the legal sphere of their action, as numerous authorities show.

Even if Jenks' claim on this property were of equal equity with that of the defrauded stockholders, the complainant might invoke the doctrine that priority in time gives him priority in right. See, *inter alia*, *Beckett vs. Cordley*, 1 Brown's Ch., 358. See, also, for its pertinency to this case, *Wallis vs. Thornton*, 2 Brock., 422.

ENOCH TOTTEN for Mrs. Hitz :

1. The deed of trust to Donaldson and Prentiss was fraudulent and void as to Mrs. Hitz.

The requirements of the statute touching acknowledgments of deeds by married women were not observed ; the deed was procured by fraud ; it was wholly without consideration.

Among the authorities cited, *Johnson vs. Wallace*, 58 Miss., 335, discusses at length the question of the requirements, and what is due compliance with them, in the matter of an acknowledgment by a *feme covert*.

2. The so-called deed of June 16, 1877, purporting to be from Mrs. Hitz and her husband to Sarah L. Crane, is fraudulent and void as to all persons.

It was procured by means of fraud and deception, and the defendant Jenks, was constructively a party to such fraud ; it was not properly acknowledged ; it was without consideration ; it was fraudulently altered as to material parts by the grantee, or those claiming under the deed, after execution and delivery, and whilst in the possession of such grantee or persons claiming under the deed.

As to the effect of the alterations, see *Harper vs. the State*, 7 Blackf., 6; *Bouvier, sub verbe "Deed;" Stover vs. Lord*, 80 N. Y., 60; *Chisley vs. Frost*, 1 N. H., 145; *Morgan vs. White*, 24 How., 317; *Waringer vs. Smith*, 2 Barb. Ch., 119; *U. S. vs. Nelson*, 2 Brock., 64; *Drury vs. Foster*, 2 Wall., 24; *Vanhorn vs. Darrance*, 2 Dall., 304; *Moore vs. Berkham*, 4 Binney, 1; and others.

Jenks is not helped by the doctrine of subrogation.

Nor had Hitz any marital interest in this property of his wife's, our Married Woman's Property Act serving to abolish such inchoate right as he may have had to the future income of that estate when it was passed. See, *Magwire vs. Magwire*, 7 Dana, 188; *Buchanan's Estate*, 8 Cal., 507; *Kugh vs. Ottenheimer*, 6 Oregon, 321; *Freeman on Judgments*; *Cord on Rights of Married Women*; *Schouler's Dom. Rel.*, 300.

So that the decree in Special Term should be modified so as to grant all the relief prayed in Mrs. Hitz's cross bill.

W. D. DAVIDGE, for Jenks and Tyler, and R. D. MUSSEY, for Prentiss, contended that—

1. The bank could not resist Jenks' claim. The debt due under the first deed of trust was paid by Jenks' money. The notes themselves and the records of the bank show that prior to the payment by Jenks of his \$20,000, the interest on the notes had been paid, till July, 1877, so that \$20,000 was the precise amount due. If the bank failed to retire the notes when paid that cannot affect Jenks. It is not the case where a prior incumbrancer, losing his security, seeks to have it re-instated, but where a prior encumbrance is discharged with the money advanced by a later encumbrancer.

Sec Insurance Co. vs. Eldredge, 102 U. S., 545; *Williams vs. Jackson*, XI Wash. Law Rep., 810.

2. The averments of the cross-bill of Mrs. Hitz are not sustained by the evidence.

3. The amended cross-bill of Mrs. Hitz, is answered in several ways.

A. The evidence shows that the changes in the deed to Miss Crane were made before execution.

B. It was not necessary to give effect to Mrs. Hitz's conveyance of her property, that her husband should join in the deed, as our Married Woman's Act shows. See *Wing vs. Schramm*, 13 Hun., 377; *McIlvaine vs. Kadel*, 30 How., Pr. Rep., 193; *Farr vs. Sherman*, 11 Mich., 33; *Watson vs. Thurber*, Id., 458.

C. But the conclusive answer is that, Jenks' money having gone to discharge a prior valid mortgage on Mrs. Hitz's property she cannot assail his right, in a court of equity, without paying back that money with interest. See *Sheldon on Subrogation* § 8; *Gilbert vs. Gilbert*, 39 Iowa, 657; *Price vs. Hobbs*, 47 Md., 384; *Bowie vs. Berry*, 3 Md. Ch. Dec., 359; *Burnhisel vs. Firman*, 22 Wall., 170; *Davis vs. Gaines*, 104 U. S., 386.

Mr. Justice JAMES delivered the opinion of the court.

The original bill in this cause was filed by Keyser as Receiver, appointed under the national banking law of the German American National Bank, a corporation organized in the city of Washington. From the voluminous testimony taken on behalf of the several parties, we deduce the following conclusions:

On the 26th of January, 1876, the defendants, John Hitz and Jane C. Hitz, his wife, conveyed to Donaldson and Prentiss certain real estate, in Washington, which she had owned as a married woman before the passage of what is known as the Married Woman's Act of 1869, in trust to secure the payment of two promissory notes, which had been dated of the 5th of the same month, each for the sum of \$10,000, drawn by defendant Chipley, payable to the order of defendant, Halstead, in one and two years from date, with interest at the rate of ten per centum per annum. This deed of trust provided that John Hitz, the husband, should occupy and take the rents and profits of the premises until default, and that upon final payment the release should be to him, his heirs and assigns. The notes were duly endorsed

by Halstead, to "The German American Savings Bank," a banking corporation in Washington, which was afterwards, on the 14th day of May, 1877, organized, by proper proceedings under the national banking law, as a national bank, under the name of "The German American National Bank, Washington" The notes in question, with other assets of the savings bank became the property of the national bank.

The records of the bank show that a loan of \$20,000 was made to Chipley, the maker of these notes, on the 26th of January, 1876, the day of the date of the deed of trust, that deed being noted as the security. No such loan was made to Chipley, and it is not shown that any money was paid out at that time to any person on account of this transaction. Chipley and Halstead were merely men of straw, and the use of a security made by them was a contrivance by which Hitz and Prentiss, two of the officers of this very extraordinary institution, proposed to conceal and at the same time provide for certain antecedent transactions. Hitz had incurred considerable liabilities to the bank, which it had become necessary to adjust, at the same time that the savings bank should be enabled to exhibit real estate securities based upon transactions in the customary form of its legitimate business. The actual transaction was indicated when Prentiss, on receiving the notes, wrote under Chipley's signature, the number and name of Hitz's post-office box; and it is established by the testimony that Hitz was the actual party and debtor in the transaction. The intent and the effect of the contrivance was to conceal from the public, and especially from the bank examiner, his improper liabilities to the concern in which he was an officer, to secure them by the usual real estate security, and to fix periods of credit by which the conversion and application of this security should be determined.

Afterwards, in the month of June, 1877, when the savings bank had been converted into a national bank, subject to the provisions of the national banking laws, and among others to that provision which required them to keep on hand a sum of money equal to twenty-five per centum of their notes

in circulation and of their deposits, the reserve fund of the German American National Bank was in danger, and it became necessary to replace the Chipley notes and their real estate security with cash. Hitz, being advised that defendant Tyler, as agent or broker for the defendant Jenks, had in his hands the sum of \$20,000 for loan upon real estate security in Washington, informed Tyler that he would in a few days be prepared to submit a proposition for that amount, in order to pay the Chipley notes. He explained that it would be dangerous to borrow and secure the money in his own name, and proposed to have the property transferred to some third person, and through that person to consummate the loan. Subsequently certain transactions were had. By a deed dated June 16, 1877, Donaldson and Prentiss, trustees in the deed which secured the Chipley notes, released the premises to Jane C. Hitz and her heirs, reciting that those notes were paid. On the same day a deed was prepared in which Mrs. Hitz appeared to be sole grantor, conveying the property to one Sarah L. Crane, for an alleged consideration of \$40,000, which was not in fact paid. This deed was afterwards altered by erasures and re-writing, so as to include John Hitz as one of the grantors. The circumstances and effect of this alteration will be considered later. This deed was acknowledged by Mrs. Hitz on the 18th and by Mr. Hitz on the 20th of June. By a deed dated on the 20th Sarah L. Crane conveyed the premises to defendant Tyler, in trust to secure her promissory note of that date for the sum of \$20,000, payable to the order of John Hitz three years after date, with interest quarterly, at the rate of eight per centum per annum. This note was endorsed by Hitz, with waiver of notice and protest. He thus made his liability absolute, and substantially made himself the actual debtor. Prentiss, who was cashier of the bank, made himself party to this negotiation. Some of the conveyances, notably that from Mrs. Hitz and her husband to Crane, were prepared under his supervision and by his procurement. Throughout the transaction it was understood between Prentiss, acting for the bank, and Hitz, on one part, and Jenks,

through his agent, Tyler, on the other, that the original and first lien of the Chipley trust was to be got out of the way and extinguished, and that, to this end, the money lent by Jenks was to be immediately applied by the bank to the payment of the Chipley notes. In other words, although the loan was nominally made to Crane, it was understood to be substantially a loan to Hitz, or for his use, and that he was at the same time to turn the money over to the bank, in order that it might be at once applied to the satisfaction of the Chipley trust. In accordance with this understanding Jenks' check on a Philadelphia bank for the amount of the loan was made payable to the order of, and was by Tyler delivered to Prentiss, as cashier, and it was by Prentiss's endorsement made payable to the German American National Bank when he forwarded it to Philadelphia for collection. By this means this money went directly to the credit of the bank, and became part of its funds, but applicable, both as against Hitz and his wife and as against Jenks, solely to the payment of the Chipley notes. From that moment its application was fixed. It does not appear by the books of the bank that it was applied immediately, but as against the bank, and, therefore, as against the complainant, whose rights are only those of the bank, it must be treated by a court of equity as having been applied according to the contract under which it was received. Hence it must be held that the Chipley notes were satisfied on the 20th of June, 1877, if the Jenks loan was sufficient to pay what was due on them, provided the bank authorities could lawfully allow them to be paid in anticipation of maturity, and provided the bank was bound by the transaction carried out by its officers, Hitz and Prentiss. As a matter of fact, the interest on the Chipley notes had been paid at that time, so that the Jenks loan was precisely adequate to the payment of the principal. The question of the bank's power and obligation will be considered.

The actual conduct of the bank officers in the subsequent treatment of the matter was certainly extraordinary. It appears from the bank books that Prentiss undertook to place

the money received from Jenks to his own credit in a certain trustee account which included other funds ; that for some time afterwards the Chipley notes appeared on the books, and were exhibited to the bank examiner, as living assets ; that in October, 1878, in two several entries, they were credited as paid, and that finally on the last day of that month, the day on which the bank went into the hands of the receiver, they were entered as "returned" to the list of assets ; in other words, as not paid. These book-keeping statements are entirely immaterial ; but if they were material, the admission of payment, made by the bank against its own interest, must outweigh the subsequent statement made in its own favor ; especially when the later entry was made under suspicious circumstances. Their actual importance is that they confirm the testimony as to the nature of the contract under which the Jenks fund was received.

It is objected, however, by complainant, that the Jenks loan was made six months before the second of the Chipley notes was due ; that this note bore a high rate of interest, and that even the directors, and, *a fortiori*, the officers of the bank, could not make a valid contract to receipt payment in anticipation, because they stood in the strict relation to the stockholders and creditors of the bank of trustees of these notes, and because trustees cannot vary the terms of payment. Numerous cases were cited to us in which the transactions of trustees have been held invalid because they departed in that way from the terms and limitations of the instrument which created the trust. We should give great weight to them if we supposed that the powers of the directors of a national bank were regulated by the strict principle of a special trust. We think that they are not. It is true that these directors act in a fiduciary capacity, but they are trustees clothed by the statute with a power of management, and this power to manage the affairs of the bank implies a considerable element of discretion. We think that this discretion fully embraces a case in which cash, which is needed for the purpose and legitimate business of the bank, may be obtained for a debt which it holds, al-

though that debt is not yet due. In this case the security was inherited from an institution whose business it was to lend money on real estate securities; but it was not the proper business of its successor, a national bank, to carry such investments, and it would seem to be a very proper act of discretion, in exercising the power of management, to convert such unavailable assets into money by accepting payment in anticipation. We hold, then, that there was no defect of power in the directors to make this transaction, and to bind the bank by a contract that the Jenks loan should be applied immediately to the extinction of the Chipley notes.

But it is objected further that, as a matter of fact, the directors never made any such contract, and that the officers who did make it were not empowered to do so either by virtue of their office or by special authorization. We think it is a sufficient answer to say that the bank received the money and cannot retain it except in accordance with the terms of the contract under which it was received. As to Jenks, it came into the hands of the bank charged with a trust, and the retention of the fund must constitute an acceptance of the trust and at the same time a ratification of the acts of its officers.

If the Chipley notes were extinguished by this transaction, the complainant took nothing by Miss Crane's deed of November 11th, 1878, purporting to convey the premises to him in trust to secure the payment of these notes. Not only was it an attempt to secure a non-existing debt, but it was made by one who was a naked trustee, without power to charge the property.

These views dispose of the case of the receiver. He has no claim against this property. It remains to consider the case set up by Mrs. Hitz in her cross-bill and amended cross-bill. She alleges that the deed to Crane, in which she originally appeared to be the sole grantor, was altered after she had executed and acknowledged it, so as to describe herself and her husband as grantors. Having inherited and held the premises as a married woman before the act of

1869, she claims that she continued to hold them as at common law after that act, and that the joinder or non-joinder of her husband in her deed was a very material matter ; so that an alteration, after she had executed and acknowledged it, was a very material alteration.

It is not worth while to consider the questions touching the effect of a sole conveyance by a married woman, since the act of 1869, of real estate owned by her before that enactment ; or touching the effect of alterations made without the knowledge of the grantor before delivery to the grantee, until we shall have considered the question of fact as to when the alteration was made. The scrivener who both prepared the original paper and made these alterations testifies that they were made before Mrs. Hitz signed and acknowledged the deed. He had previously made an affidavit that she had both signed and acknowledged the instrument before they were made. That affidavit is not evidence as to the main question, and is brought out only as affecting the credibility of the witness. In his deposition, however, he is very positive as to his memory that the paper bore no signature when he altered it. A number of witnesses, including experts in processes and in the effect of mechanical processes, and lawyers who spoke from their professional habits and knowledge, were examined as to the question whether the seal which accompanied Mrs. Hitz's acknowledgment was impressed above one of the erasures, or had itself suffered by the process of erasure, thus showing that the erasure was made after acknowledgment. We have very carefully examined both the testimony of the witnesses on this matter and the paper itself. It may be sufficient to state that most of the experts were of opinion that the seal was impressed after the erasures had been made. An allegation, or more properly, an accusation of this kind must be satisfactorily made out, in order to justify a court in holding a deed void for alteration ; and this charge has not been made out. Taking the testimony of the only witness who speaks from personal observation as to the presence or absence of a signature when he made the alteration, and the supporting testimony of

the experts, we are compelled to the conclusion that the alteration was made before execution and acknowledgment, and, therefore, did not affect the validity of the deed. Even if this were doubtful, it is clear that it was made before delivery to the grantee, and while it was in the hands where Mrs. Hitz left it. There is nothing to show that the grantee knew or was charged to know that the alteration was made without the knowledge and consent of the grantors.

Next, it was objected that the alleged consideration of \$40,000 was never paid by Crane. As to Jenks, it is immaterial whether it was paid or not. This conveyance was part of an entire arrangement by which a loan was to be secured on this land, and this arrangement supplied the consideration.

We think, then, that the complainant has no interest in this property in respect of the Chipley notes; that the release of the original trust by Donaldson and Prentiss was valid; that the deed of Crane to complainant further to secure those notes must be cancelled; that the deed of Mrs. Hitz and her husband to Crane, and the deed of Crane to Tyler, in trust to secure Jenks, are valid; and that the trustee in the latter should be allowed to proceed to execute his trust.

It may be that, after payment of the note to Jenks, by sale of the premises, a surplus may remain to be disposed of. It is proper that the trustee be required, in case he makes sale and receives such surplus, to pay the latter into court. It appears, also, that a considerable amount of rents accruing from the premises has been collected and paid into court by the complainant. In the argument it was claimed on one hand that these sums should go to the creditors of Hitz. For the present, we do not dispose of either question, and this cause will be retained in order that the parties claiming to be interested may litigate their rights by proper further proceedings.

THE UNITED STATES, EX REL. WILLIAM W. WARDEN,
vs.

WILLIAM E. CHANDLER, SECRETARY OF THE NAVY.

LAW. No. 24,811.

{ Decided October 15, 1883.

{ The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

1. By the 18th Rule of this court all petitions for mandamus are required to be presented to a judge in Special Term or in Chambers when the case can be afterwards certified to the General Term.
2. In applications for mandamus the rule to show cause why the writ should issue is not grantable as of course; the court in the exercise of its discretion will refuse the preliminary order where the petition itself shows that further proceedings would be a waste of time and would ultimately prove futile; especially will this be the case where the grounds upon which the respondent refuses to act in the manner required by the petitioner are set forth in the petition, and appear to the court sufficient to justify his refusal.
3. Before this court will award a mandamus against an executive officer the petition must disclose: 1. That the party applying has a clear legal right to the relief he claims, and that he cannot obtain it by any other proceeding; 2. That there exists a clear legal duty on the part of the official against whom the right is asked, which he refuses to perform; 3. That the duty which is thus claimed and imposed is one ministerial in its character and in no degree discretionary.
4. The attorney and counsel of the party in interest cannot act as the relator in an application for mandamus; the action must be brought in the name of the owner of the thing claimed, who alone can be recognized as the claimant.
5. A party who has only a partial interest in the amount claimed has no authority, to the exclusion of all other claimants similarly circumstanced, to use the name of the United States in an application to the court to dispose of the whole amount.
6. The question whether an executive officer of the Government shall revise the action of his predecessor is one addressed to his discretion, and cannot be interfered with by this court by mandamus.

APPLICATION for mandamus.

THE CASE is stated in the opinion of the court which was delivered by Mr. Justice HAGNER.

This is an application by William W. Warden for a mandamus to the Secretary of the Navy to compel him to carry into effect a provision contained in the Sundry Civil Appropriation bill, chapter 133, approved March 3, 1881, in the following words: "To enable the Secretary of the Navy to establish at the Isthmus of Panama naval stations and depots of coal for the supply of steamships of war, \$200,000, to be available for expenditure as soon as suitable arrangements can be made to the proposed end."

The petition is very lengthy, and professes to set forth in

detail the history of the action, legislative and executive, of the Government, for many years past, with respect to the location on property claimed by the Chiriqui Improvement Company, on the Isthmus of Panama, of naval stations and depots of coal. It states that in 1859, movements in this direction were commenced under the administration of President Buchanan ; that the minister plenipotentiary from New Grenada directed the attention of President Buchanan to the Chiriqui lagoon and the harbors and property situated thereon as especially adapted for that purpose ; that the President, in consequence of these representations, directed the Secretary of the Navy to take suitable action to secure to the United States the use of these harbors, and the then Attorney-General examined the title of the company to the lands, &c., and made a favorable report on the subject ; that the Secretary of the Navy, in May, 1859, entered into a written agreement with the Chiriqui Improvement Company, subject to ratification by Congress, to secure the right to use these harbors, &c., for which the company was to receive \$300,000, and that this agreement was approved by the government of the United States of Colombia ; that the Secretary of the Navy transmitted this contract to Congress for approval, and a bill was reported by the Committee on Naval Affairs to carry out the contract, and a preliminary appropriation of \$10,000 was made to enable the President to send some competent person to the Isthmus of Panama to examine and report as to the probable quantity of coal to be found there, upon the lands of the company, and the character of the harbors, and generally upon the value of the privileges contracted for ; that the President appointed a commission of officers of the army and navy, who repaired to Chiriqui, and returned in November, 1860, and submitted a report to the Secretary, showing the value of the harbors, &c., which was sent to Congress by President Buchanan, in January, 1861 ; that owing to the disturbed condition of the country at that time, and for other reasons, Congress took no action in reference to the subject at that session ; that in July, 1862, an act was passed

appropriating a sum of money and authorizing the President to make provision for the transportation and colonization in some tropical country of such persons of the African race made free by the provisions of that act as might be willing to emigrate, and that President Lincoln selected the aforesaid Chiriqui property as the most suitable for said colonization purposes ; that by direction of the Secretary of the Treasury upon request of the President, the solicitor of the Treasury, Mr. Jordan, made a thorough investigation of the harbors, &c., and the title of the company to the lands, and reported in detail that the title of the company was perfect, and that the harbors, climate and agricultural products were all of the most desirable character ; that thereupon the President, through the Secretary of the Interior, in September, 1862, entered into a contract with the company for the purchase of part of its lands in Chiriqui, upon which to settle and colonise the freedmen ; but that soon thereafter a new policy with reference to persons of the African race was decided upon, and nothing further was done upon the subject ; that the said contracts made by the administrations of Presidents Buchanan and Lincoln remained in abeyance until an early period during the administration of President Grant, when they were brought before the President for consideration, and were referred by the President to the Attorney-General for examination, especially with reference to the proposed naval stations and coaling depots ; but the papers in the case did not reach the Attorney General, having been mislaid, and were not found until a few days before the close of President Grant's administration.

That at an early period of the administration of President Hayes, the subject was taken into consideration, and in January, 1880, a select committee of the House reported a resolution favoring immediate action by the Government, with a view to obtaining title to the Chiriqui property ; that in conformity with that resolution, the Secretary of the Navy despatched vessels to different points, on both sides of the isthmus, which took possession of the harbors and lands of the company on the Pacific and Gulf coasts, and the

Government has ever since continued in possession, in accordance with the agreement between the Secretary of the Navy and the Company in 1859; that in the same year, the Secretary of the Navy, in his annual report, stated that he had caused steps to be taken for the establishment of coaling stations on each side of the isthmus, at suitable points, the one at Chiriqui in the Caribbean Sea, and the other on the Pacific, at a distance of less than a hundred miles apart; that these were the only safe and sufficiently commodious harbors on the isthmus, "and although the Department did not, before making the deposits of coal, acquire title to the lands occupied, yet it assured itself that no difficulty would be likely to arise on that score;" and that the President, in his annual message in December, following, confirmed this statement of the Secretary. It further states that the President and the then Secretary of the Navy, Mr. Goff, examined the matter in all its aspects, and thereupon an agreement was made between those officers on behalf of the United States on the one part, and the petitioner, as attorney of the Company, on the other, whereby, besides other considerations, the sum of \$200,000 was to be paid to the owners for the aforesaid lands and other privileges for naval stations, &c., a part of which property the Government had already taken possession of, provided Congress should make the necessary appropriation therefor; that in February, 1881, in order to consummate the agreement and complete the establishment of the naval stations, the President sent a special message to the House, recommending the appropriation, and transmitting a letter from the Secretary of the Navy, describing the property in possession of the Government, and stating that, in order to proceed further towards the establishment of the stations, an appropriation of \$200,000 was requisite; that this special message was referred to the Committee on Naval Affairs, by it unanimously approved, and an amendment proposed to the Sundry Civil Bill, which is the paragraph herein already quoted, appropriating \$200,000; that throughout the debate on the subject, the property of the company was that which was solely in the minds

of the members of the House, and that the appropriation was designed for the purpose of acquiring that property, and none other, and that the act was subsequently approved by the President, on the 3rd of March, 1881; that on the next day, Mr. Garfield became President, and Mr. Hunt was subsequently appointed Secretary of the Navy; that the matter of this appropriation was soon afterwards brought to the attention of Mr. Hunt and the subjects thoroughly discussed with him by the petitioner, as attorney, as aforesaid. The petition then states that Secretary Hunt, in his annual report of November, 1881, made mention of the Chiriqui project in the following terms:

"COALING STATIONS ON THE ISTHMUS OF PANAMA."

"In the act of Congress making appropriations for sundry civil expenses of the government for the fiscal year, ending June 30, 1882, and approved March 3, 1881, the sum of \$200,000 was appropriated 'to enable the Secretary of the Navy to establish at the Isthmus of Panama naval stations and depots for coal, for the supply of steamships of war, to be available for expenditure as soon as suitable arrangements can be made to the proposed end.'

"Constantly, since the passage of this act, the department has been importuned to expend the sum here appropriated in acquiring title to certain rights upon the isthmus, claimed to belong to Ambrose W. Thompson, as the representative of a corporation styling itself the Chiriqui Improvement Company. The appropriation seems to have been granted in pursuance of the recommendation of the Hon. N. Goff, jr., Secretary of the Navy, in a report made by him to President Hayes, under date of January 19, 1881. This report was submitted by President Hayes, in a message to the House of Representatives, dated February 2, 1881. It is evident that the report of the Secretary of the Navy, and the message of the President contemplated the establishment of the naval stations and depots claimed to belong to the Chiriqui Improvement Company, and Ambrose W. Thompson. Indeed, the Hon. R. W. Thompson, Secretary of the Navy, in his

report, under date November 30, 1880, states that he had 'caused coal to be deposited in small quantities on these lands for use by our vessels whenever it may be needed.' This step was taken with a view to acquiring title to these lands by our Government. The appropriation, however, seems to have carefully avoided all mention of the selection of these lands, or of any other specific lands for the contemplated coal stations. Under the general instructions of this authorization I have been unable to satisfy myself that the interests of the Government will be advanced by the payment of this sum, or any portion of it, for the grant represented by Mr. Thompson. From reports made to the department from reliable sources, since the passage of the appropriation and before, I am not satisfied that the lands and harbors known as the Chiriqui grant are the best adapted for coal stations. Several parties claim to be owners of the grant which Mr. Thompson asserts belongs entirely to him and his company. It is also urged that the title of Mr. Thompson and the company is not valid; that it rested originally upon a grant conferred by the United States of Colombia under certain conditions, which have not been complied with by the grantees; that such coaling stations would result in a useless expenditure of money, involving large expense to the Government in the maintenance of the stations, and probably resulting in their abandonment as being in an expensive, isolated, inconvenient and unhealthy position. The sovereignty over these lands has undergone changes since the date of the original contract; and it is by no means certain that the obligations said to be conferred under that contract will be ratified and held valid by the government now in power there. It is further reported that land in this lagoon is almost valueless, and that any one settling there and cultivating it acquires title by mere possession. For these and other reasons, I have declined to treat for the lands offered by Mr. Ambrose W. Thompson and the corporation in whose name he acts."

The petitioner then proceeds to complain, upon various grounds, of the action of Secretary Hunt, and states that he

applied for a re-examination of the matter, but without success ; and narrates certain proceedings in the House of Representatives, by which the secretary was called upon to furnish the particulars of the statements set forth in his said report ; and in the 51st paragraph of the petition, it is stated that on the advent to office of the present Secretary, Mr. Chandler, the petitioner called his attention to the subject anew, and requested him to carry into effect the act of Congress in the manner which the petitioner considers it should have been carried out by Mr. Hunt, and received from him, in June, 1883, a letter, in which the Secretary states : "In reply to your letter of the 23d inst., asking to be informed as to my decision relative to the act of March 3, 1881, appropriating \$200,000 to enable the Secretary of the Navy to establish at the Isthmus of Panama naval stations and depots of coal, &c., I have to say that the decision is not to revise the determination of Secretary Hunt not to expend the appropriation, but to submit the whole subject to Congress at its session in December." And to the petitioner's additional request that the matter should be referred to the Attorney General for examination, Secretary Chandler made written answer, refusing to make that reference.

The petition then claims that the company has done all in its power to carry out the contracts before referred to, and is willing to do whatever else is necessary in the premises, and that it is entitled to receive payment of the money, and that this court should award a mandamus commanding the Secretary to make such payment.

I have thought it proper to recite the averments of the petition at this length, that the grounds of our decision should be more fully understood.

To this tribunal alone, of all the circuit courts of the United States, is entrusted the power to grant writs of mandamus to the executive officers of the Government. The fact that this exceptional power is vested here alone, admonishes us that it should be exercised with great circumspection. The general rule in applications for mandamus, is that the writ should be granted with caution, and this rule

should be applied with increased force in cases like the present, where this extraordinary power is invoked to direct high officers of the Government in the discharge of important official duties.

As matter of practice, we remind counsel that, by our 18th rule, all petitions for mandamus are required to be presented to a judge in Special Term, or in chambers, when the case can afterwards be certified here. That course was not observed in the present case, but the petition was filed in the General Term. In the examination of the questions presented, however, we shall assume that the proper formalities have been observed, and consider the case as though certified here by one of the judges present.

It seems to be supposed by the relator, that the rule requiring the defendant to show cause why the writ should not issue, is granted as of course upon the filing of the petition for mandamus. That this course is very generally adopted, is true, because usually the petition shows on its face a strong *prima facie* case, and without disclosing full the ground upon which the officer refuses to act; but the practice is not uniform, as in the case of *habeas corpus*, where the issue of the writ almost universally follows the filing of the petition. In applications for mandamus the court, in the exercise of its discretion, will refuse the preliminary order, if the petition itself shows that further proceedings would be a waste of time and would ultimately prove futile. In the case before us the petition sets forth, in the letter from the Secretary of the Navy, the ground upon which he bases his refusal to act in the manner required by the petitioner. He could say no more, and need say nothing else, if he were compelled to make answer to the petition at length. And if the grounds of that refusal, upon examination appear sufficient, there could be no excuse for prolonging the litigation by requiring an answer to an application that cannot stand of its own strength.

Before this court will award a mandamus against an executive officer it must be made to appear in the proceedings:

1st. That the party applying has a clear legal right to the relief he claims, which he cannot obtain by any other proceeding ;

2d. That there exists a clear legal duty on the part of the official against whom the right is asked, which he refuses to perform ; and—

3d. That the duty which is thus claimed and imposed is one ministerial in its character and in no degree discretionary.

Does the petition in this case disclose the existence of these essential prerequisites to the issuing of the writ ?

As to the title of the relator to the relief claimed. He seems to base his right to sustain this suit upon three grounds :

He alleges he is a member of the bar of this court and of the Supreme Court of the United States. Of course that circumstance could give him no special title to sue in this matter.

Next, he claims, in section 24 of his petition, that he is "the attorney and counsellor for the Chiriqui Improvement Company." As attorney and counsel for this company, he can have no right to make this application, as such actions must be brought in the name of the owner of the thing claimed, who alone can be recognized as the claimant. But this relator may not be the only counsel for this company. There may be others of equal or greater authority ; and although he may be their counsel to-day, his place may be occupied to-morrow by others. But upon plain general principles, it is impossible that there can be such a communication of title, or power to a mere attorney and counsel, as can authorize him to assume the place of the principal, of his own motion, and conduct a litigation like this in his own behalf.

Finally, he avers that he has, individually, a vested interest in the Chiriqui property, and in the \$200,000 ; that his interests and those of the company are harmonious, and his obligations to the company and others require that he shall prosecute the claim to final disposition. But it is not

claimed that his interest amounts to the \$200,000, and such assumed right to claim a portion of the sum from the company when received by it, can give him no authority, to the exclusion of all other claimants similarly circumstanced, to use the name of the United States in an application to the court to dispose of the whole amount. We might rest our refusal to issue the writ upon this manifest lack of title in the petitioner to sue, for the case is really disposed of when the petitioner fails to show in himself that clear legal right in the thing claimed which the law of the subject requires.

But supposing this difficulty to be waived, and that the company itself were here as petitioner. Let us see whether the petition presents such a clear legal right in the company, and such a clear ministerial duty on the part of the Secretary of the Navy, which he refuses to perform, as would justify us in issuing the writ.

The petitioner insists that the Secretary, in the face of the action of his predecessor, and of his own refusal, shall be commanded to pay over this \$200,000 to the Chiriqui company. The enactment simply says that the appropriation is made to enable the Secretary of the Navy to establish stations and depots for coal "at the Isthmus of Panama." The only requirement as to the location of the proposed stations and depots, is that they shall be "at" that Isthmus. This tract of country, including the territory formerly known as the Isthmus of Darien, is more than 400 miles in length, and the possessions claimed by the Chiriqui company lie near its northern extremity. No particular point along this extensive line of coast was indicated by Congress, and, in the absence of such a designation, the act necessarily devolved the selection of the site upon the officer who was charged with the expenditure of the money. The omission to designate the locality by Congress, could not have been accidental, or because of want of knowledge of the place. The lagoon bearing this name was discovered by Columbus in his last voyage, 370 years ago this month, and near by he is said to have founded a settlement, which soon melted away before the pestilential climate then existing there. Indeed, it is

strenuously insisted by the petitioner, that Congress knew all about the property, as indicating that it intended the money should be expended there. If such is the case, it is astonishing that the requirement was not inserted in the act; for this omission under the circumstances, seem to be especially indicative of a purpose on the part of Congress to leave the Secretary entirely unembarrassed in making his choice of location, whether near the railroad, or the proposed canal, or at whatever other position he should determine most convenient and salubrious: and Secretary Hunt, in deciding not to select Chiriqui, was but exercising the plain power of choice undoubtedly confided to his sound discretion by Congress in the act.

The paragraph contains the further provision that this money is "to be available for expenditure as soon as suitable arrangements can be made to the proposed end."

We look in vain through the petition for the proof that these suitable arrangements had been made. Was it designed by Congress that there should be a purchase of land on the isthmus by the United States? From the debates in the House of Representatives, incorporated in the petition, it appears that one of the members of the House, Mr. Blount, took exception to the proposed appropriation, on the ground that it might involve the acquisition of land by the Government. In reply, Mr. Goode, of the naval committee, having charge of the amendment, answered: "The purpose is to do identically what the President of the United States and the Secretary of the Navy have recommended." This reply does not seem to answer the inquiry in a very satisfactory way, and certainly the purpose was left in entire uncertainty by the language of the act itself. If a purchase was intended, the Secretary would be powerless to carry that purpose into effect, except in subjection to the positive directions of the public statutes of the United States governing the acquisition of land by the Government. By section 3736 of the Revised Statutes of the United States it is declared that "no land shall be purchased on account of the United States except under a law authorizing

such purchase." If, however, the Secretary, in the face of this explicit declaration, should have considered himself obliged to consider the paragraph making the appropriation as commanding him to purchase these lands in a foreign country from parties whose title, as Secretary Hunt says, was denounced as worthless by individuals apparently equally entitled to credence, he would then be obliged to conform to the provisions of section 355 of the Revised Statutes, which declares that, "No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort, fortification, navy yard, custom house, light house, or other public building, of any kind whatever, until the written opinion of the Attorney-General shall be had in favor of the validity of the title." The section further requires that the preliminary consent of the legislature of the State shall be given; that the district attorneys of the United States, upon the application of the Attorney-General, shall furnish all assistance or information in relation to the title; and that the secretaries of the department, upon the application of the Attorney-General, shall procure any additional evidence of title deemed necessary. And since these precautions are thus properly enjoined where property is to be acquired which lies within our own territory and subject to our own laws, *a multo fortiori* should the spirit of caution they inculcate be observed where it is proposed to enter upon the novel experiment of purchasing territory within the dominion of a foreign government, and especially of one as subject to civil disturbance as its coasts are to convulsions of nature. It seems to us that the Secretary would have been justly censurable if he had parted with a dollar of the appropriation until the spirit, at least, of these wise laws had been complied with, so that he might be assured that he would not be practically throwing the public money into the sea, while perhaps involving the country in grave political complications like those that threatened the public peace after the affair in this neighborhood at Greytown. The petition nowhere discloses that any such examination of title to the Chiriqui property had been

made or reported to the Secretary by the Attorney-General. Indeed, the absence of such report is admitted, and is charged as due to the neglect or improper conduct of the Secretary. The alleged examination by Attorney-General Black, during the administration of President Buchanan, had reference to a different project, which, on its face, was to be of no vitality or force without the subsequent approval of Congress, and this was never given. The only examination of the title claimed ever to have been made, was one said to have been conducted by the Solicitor of the Treasury. But this officer had no authority under the statutes to make the examination, which is required to be made by the Attorney-General. The position of the heads of departments, if they were obliged, positively, where an act of this character was presented to them, to apply the money against their better judgment in all such cases, would be most unfortunate. We know perfectly well that they are not expected to administer their departments in that way, but that they frequently and properly exercise a sound discretion before proceeding to act. On the same page of the statute book, which contains the appropriation of the \$200,000 in question, is to be found an appropriation for the purchase of a suitable site in the city of Washington for the erection of a fire-proof building for the Pension Bureau. But we know, as a fact, that the Secretary of the Interior made no such purchase, for from these windows we can see the building in course of erection on a public reservation. It may well be that individuals in the city, who offered their property to the Secretary of the Interior as affording a suitable site for that building, may have been inconvenienced and prevented from selling to others, because, as they supposed, they had made a favorable impression upon the Secretary, and were persuaded they would probably sell their property to the Government. But the Secretary saw fit to withhold the expenditure of the money until the meeting of the next Congress, when this provision was repealed, and the Secretary of the Interior was directed to cause the structure to be built on a designated public reservation, if it should be found suitable for the pur-

pose, and, if not, on any other appropriate public reservation. And, as evincing the caution of Congress with reference to the security of titles to land upon which public buildings are to be erected, this last act of chapter 433 of the 47th Congress contains the proviso, "that the Attorney-General shall approve the title of the United States thereto," although the site contemplated was one of the Government reservations.

In our judgment, the decision of Mr. Secretary Hunt seems to have been a wise and proper one; but certainly it was one which, under the discretion confided to him by a fair construction of the statutes, he was perfectly justified in making.

The application here, then, is effectively to compel the present Secretary of the Navy to revise the previous decision of his predecessor in a matter entrusted to his discretion. In our judgment, this court is without authority to grant such relief.

Without consuming time in referring to other decisions, it is sufficient to cite the case of *Decatur vs. Paulding*, 14 Peters, p. 497. By the act of Congress of March 3, 1837, the widow of any officer who died in the naval service was entitled to receive out of the Naval Pension Fund a certain proportion of the monthly pay of her deceased husband. On the same day a resolution was passed by Congress declaring that the widow of the late Commodore Decatur should be paid from the naval fund a pension for five years, at a greater rate than that allowed by the general law. After the passage of the law and resolution, Mrs. Decatur applied to the Secretary of the Navy, Mr. Dickerson, to be allowed the half pay given to her by the resolution, as well as the pension provided by the general law. The Secretary, after taking the opinion of the Attorney-General, decided that she might claim the one or the other, but not both. After Mr. Dickerson retired from office, Mrs. Decatur applied to his successor, Mr. Paulding, to revise the decision of his predecessor, and allow her both pensions. This the Secretary declined to do, and Mrs. Decatur applied to the Circuit Court of this District for a mandamus to compel the payment of the

additional sum. The application was refused, and the case went to the Supreme Court. Mr. Chief Justice Taney delivered the opinion of the court, which affirmed the decision of the court below. In his opinion he says :

“ The first question, therefore, to be considered in this case, is, whether the duty imposed upon the Secretary of the Navy, by the resolution in favor of Mrs. Decatur, was a mere ministerial act. The duty required by the resolution was to be performed by him as the head of one of the executive departments of the Government, in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the Government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress under which he is from time to time required to act. * * * *

“ If a suit should come before this court, which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a department. And if they supposed his decisions to be wrong, they would, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of Congress, in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the Secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it by *mandamus*, act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties.

“ The case before us illustrates these principles and shows the difference between executive duties and ministerial acts. The claim of Mrs. Decatur having been acted upon by his predecessor in office, the Secretary was obliged to determine

whether it was proper to revise that decision. If he had determined to revise it, he must have exercised his judgment upon the construction of the law and the resolution, and have made up his mind whether she was entitled under one only or under both. And if he determined that she was entitled under the resolution as well as the law, he must then have again exercised his judgment, in deciding whether the half pay allowed her was to be calculated by the pay proper, or the pay and emoluments of an officer of the Commodore's rank. * * * A resolution of Congress requiring the exercise of so much judgment and investigation, can, with no propriety, be said to command a mere ministerial act to be done by the Secretary."

So, in the present case, we think the question presented to Mr. Chandler, as to whether he would revise the previous action of his predecessor, was in itself a matter addressed to his discretion; and that the previous decision of Mr. Secretary Hunt, in like manner, was based upon a subject confided to his official discretion. We, therefore, think that it is beyond our competency to interfere in the manner proposed.

There is another matter which appears from the petition, and which may well be noticed as of importance in this connection. It seems that at the session of Congress following the passage of this act, in July, 1872, the Naval Committee submitted a report on this subject, in which they considered the question whether it would be expedient that the appropriation now before us should be repealed; and their conclusion is expressed in these words: "The committee, upon an examination of the subject, do not discover any reason why the power now vested by law in the Secretary of the Navy over the subject of the purchase of coaling stations on the Isthmus should be withdrawn. *He is not likely to purchase them unless they are required by sound public policy, nor until a perfect title can be secured.*" This is additional evidence of the continued caution which Congress as well in the report of this committee, as in the statutes before cited, has constantly endeavored to impress upon the executive officers whenever the subject of the purchase of lands is involved.

But the petition earnestly insists that an exceptional feature presents itself in this case, which calls for the interference of this court in the manner desired ; and that consists in the reiterated assertion in different forms that the duty devolved upon Secretary Hunt by Congress was not discharged by him with sufficient promptness or intelligence, or with proper good faith, and therefore it should be regarded as if it had never been performed at all. It is averred, in the first place, that he was most reluctant to examine the case ; that when at last he yielded to repeated importunities, he only considered it "cursorily," and in an imperfect and perfunctory manner ; that, although he assumed to hear the arguments of the petitioner, he paid no manner of attention to them ; that his disposition of the case was marked by ignorance and prejudice ; that he evidenced a willingness to listen to blackmailers and other irresponsible and unworthy persons, who were interested in misrepresenting the honest title of the Chiriqui company ; that his report on the subject to Congress was filled with inaccuracies of statement ; that when in compliance with a request of the committee which called upon him for information as to the averment in his report that it was based upon statements of naval officers and other persons of intelligence, and for the transmission of all the documents in the possession of the department relating to the subject, he willfully suppressed important papers, and when again called upon by the same committee to send those papers, he still refused to comply ; and that his conduct throughout the whole transaction was reprehensible ; and in unmeasured terms of censure he is charged with almost every offence of the official decalogue.

The first reply to this exceptional claim for relief is, that this is not a tribunal to sit in judgment on erroneous improper acts of public officials. If such officer is still in power, he may be removed by impeachment ; and if not, and he has acted corruptly, he is subject to indictment and punishment. But in behalf of my colleagues and myself, I take great pleasure in saying that not one word of all this labored attack upon this distinguished officer has produced in our

minds the slightest suspicion that his action from beginning to end in the matter was not honorable and wise and patriotic. This gentleman, before he became Secretary of the Navy, was, as we know, a judge of an important court of the United States, where he discharged his responsible duties to the satisfaction of the Government and the suitors. By President Garfield he was appointed to the post of Secretary of the Navy, from which he was transferred by President Arthur to one of the most responsible diplomatic stations in the gift of the Government ; and he is now absent from the place of this attack, as the representative of the United States, representing his Government with general acceptance. We have no idea of attaching one breath of censure to his official acts upon any such *ex parte* statements, founded, we are bound to believe, in the most favorable view, on prejudice and misinformation. And so far from believing that there exists any ground for reprehension in his conduct in this matter, we are satisfied he deserves the thanks of the country for what he did. There is nothing in this personal attack that changes our opinion that the petition should be dismissed ; and it is dismissed accordingly with costs.

ABRAHAM H. HERR vs. JOHN A. BARBER ET AL.

EQUITY. No. 7,227.

{ Decided October 20, 1888.

{ The CHIEF JUSTICE and Justices HAGNER and JAMES sitting.

1. Where a decree is made against several defendants for the payment of a sum of money, a payment of the amount by either of them works a satisfaction of the decree, because all the defendants are principals and the duty to pay the whole sum devolves upon each of them. Therefore, after a decree is thus satisfied, an execution can no longer issue under it against the other defendants for the purpose of enforcing contribution from them.
2. The Maryland act of 1763, chap. 23, sec. 8, providing that where a judgment has been recovered against the principal debtors and sureties and the judgment has been satisfied by one surety, the creditor shall be compelled to assign the judgment to him, is in force in this District, but it applies only to cases where payment is made by a surety on judgments, and not to decrees.
3. Contribution, at law, cannot be enforced by one *tort-feasor* against his co-wrong-doers, where the transaction out of which the judgment arises involves moral turpitude. So, if the controversy, upon which a decree is rendered, were a breach of trust on the part of all the defendants, the defendants would stand in the position of joint *tort-feasors*, and one of them, after having paid the amount of the decree, could not have an execution upon it against his co-defendants, for the purpose of enforcing contribution from them.
4. Where, after a decree is rendered against joint *tort-feasors*, one of the defendants conveys his land and, subsequently, another of the defendants satisfies the decree by payment, the land so conveyed is discharged from the liability which attached to it while the decree remained unsatisfied.
5. Precedents and principles should not be departed from in order to meet what may be thought to be the abstract justice of a particular case.

STATEMENT OF THE CASE.

The bill in this cause was filed in April, 1880. It alleges that in December, 1873, Samuel Strong had filed a bill against John A. Barbour and a certain Dodge and Darneille, for a discovery and account, and to recover a sum of money which the plaintiff alleged was due to him by the defendant as his agents. In February, 1876, a decree was passed ordering that the defendants should pay to the complainant the sum of \$2,115.92, with costs. After the decree, viz., in March, 1876, Dodge and Darneille conveyed the real estate, which is the subject of controversy in this suit, to the complainant Herr. An appeal was taken from the decree to the Supreme Court of the United States, but was dismissed. After the entry of the mandate of that

court, in June, 1879, an execution was issued upon the decree, and by direction of the solicitor of Strong, levied upon real estate belonging to John A. Barber. In September, 1879, Barber paid one thousand dollars on the decree to Totten, for whose use it had been entered. In January, 1880, the marshal was ordered to sell the property of Barber under the execution, to raise the balance of the money. On the 9th of February, 1880, the execution, by order of Strong's solicitor, was returned "released," and an *alias* execution was ordered and, by his direction, levied upon the property conveyed by Dodge and Darneille to the complainant. On the next day, the balance due under the decree, with interest and costs, was paid by John A. Barber to Totten. A receipt was given to Barber for the amount, and the decree was entered, by Totten's order, for the use of Margaret C. Barber, and an order was then given by Barber's solicitor to sell the land so conveyed to the complainant, under the execution. Thereupon this bill was filed, charging, among other things, that the decree had been entered to the use of the said Margaret C. Barber, by the procurement and contrivance of said John A. Barber, and for his benefit and behoof after its satisfaction and extinguishment, in order to compel the complainant by force of the execution to contribute in favor of the said John A. Barber towards the payment of the decree, notwithstanding it had been already extinguished by satisfaction made by the said Barber to Totten. It prayed that the execution and levy upon the complainant's property should be vacated and the property decreed to stand exempt from all claim on the part of John A. Barber, or Margaret C. Barber. In the bill an affidavit by the defendants to their answers was expressly waived.

Mrs. Barber, alone of the defendants, answered, and without oath. Her answer insisted that the assignment of the decree and its entry on the docket to her use, were made by her authority and with her consent. It denied specifically that John A. Barber had induced Totten to have the suit against Strong entered to her use, but, on

the contrary, stated that the inducement proceeded entirely from her, and that the money paid by her to Totten was the consideration for the transfer to her of the decree; it claimed that, as a purchaser for value, she was entitled to all the rights under the decree to which the complainant Strong was entitled; and denied that it had been satisfied, or was extinguished. Issue was joined upon this answer, and the testimony of Mrs. Barber and of Mr. Totten, both of whom were called by the complainant, is the only evidence taken in the case.

The court below, at special term, passed a decree vacating and setting aside the execution and levy upon the property conveyed to Herr, and declaring that the property should be exempt and free from further claim in the premises, and the appeal was taken by Mrs. Barber from that decree.

JOHN SELDEN for plaintiff:

That the balance due upon the decree recovered by Strong was paid by John A. Barber with money that was absolutely his own, though derived from the bounty of his mother, is the involuntary conclusion to be drawn from her testimony.

And such also, at least, is the admission of the son, under the legal effect of the decree *pro confesso*, passed against him below.

The circumstance that the money paid by the son was derived from the generosity of the appellant can have no influence upon the case.

The legal incidents of absolute property do not depend upon the source from which the title to such property is deraigned.

They are the same, both as to real estate and to personalty, whether obtained by intestacy or by contract, whether by testamentary disposition or by gift *inter vivos*.

And the payment made by John A. Barber must be considered as attended with the same consequences, "no matter how he obtained the money." *Alderson vs. Ames et al.*, 6 Md., 56.

Was the decree rendered in favor of Strong extinguished by the payment by John A. Barber of the balance due thereon?

Upon this question it is submitted, with much confidence, that no difficulty can arise.

Payment by one of several joint contractors enures to the benefit of all. 5 Rob. Pract., 883.

A *bond* may be extinguished when paid by a *surety* therein. Woffington vs. Sparks, 2 Vesey, 569; Jones vs. Davis, 4 Russ., 278.

So, a *mortgage* is extinguished when paid by a person who is under obligation to discharge it. Walker vs. Stone *et al.*, 20 Md., 198; Boyd vs. Parker & Co., 43 Id., 202.

In like manner a *judgment* or *decree* is extinguished when paid by one of several who are bound thereby. McGinnis vs. Harris, 7 Jones (Law), 216; Russell vs. Hugenin, 1Scam., 562; Gillett vs. Sweat, 1 Gilm. (Ills.), 475; Thompson vs. Fifth Nat. Bank *et al.*, 54 Ill., 60.

Contribution cannot be enforced by *execution* upon the judgment or decree. Hamwatt vs. Wyman *et al.*, 9 Mass., 142; Brackett vs. Winslow *et al.*, 17 Id., 159; Holmes vs. Day, 108 Id., 596; National Security Bank vs. Hunnewell, 124 Id., 261.

Nor the judgment or decree continued in existence by *assignment*, whether to the person who pays or to another at his instance. Adams vs. Drake, 11 Cush., 505; Bartlett vs. Warrington *et al.*, 4 Ala., 692; Hogan vs. Reynolds, 21 Id., 59; Bones vs. Aiken *et al.*, 35 Iowa, 536; Ontario Bank vs. Walker, 1 Hill, 653; The Bank of Selina vs. Abbott, 3 Denio, 182; Morley vs. Stevens, 47 How. Pr., 229; Booth vs. F. & M. Nat. Bank, 74 N. Y., 232.

The purpose of the parties cannot alter the legal effect of the payment. "The judgment," says Selden, J., "becomes thereby extinguished, whatever may be the intention of the parties to the transaction." Harbeck vs. Vanderbilt, 20 N. Y., 398.

The equitable distribution of the expense incurred by one of several individuals, in discharging an obligation com-

mon to them all, is effected through the familiar process of *contribution*.

But this process plainly recognizes *the extinguishment of the original obligation*, and its incapability, in consequence, of transfer or assignment. 1 Story Eq. Jur., §§ 499 *b*, 449 *d*.

The legal effect of the decree obtained by Strong was to implicate in a common breach of trust all of the defendants against whom that decree was pronounced.

It can scarcely be necessary to urge that, between defendants thus situated, contribution could not be enforced.

The doctrine of extinguishment by payment reposes upon very satisfactory principles.

If one of several bound by the same judgment or decree, were permitted to become the owner thereof, by payment, and to enforce it, at pleasure, against any or all of his co-debtors, the right of contribution would be defeated where now it prevails, and enforced where it does not at present exist.

Upon satisfying the first payer, his co-debtor might, in turn, lawfully enforce the judgment or decree against all or any of the others, these again might enforce it *inter sese*, and the proceedings might prove interminable.

R. ROSS PERRY and JOHN C. WILSON for Mrs. M. C. Barber:

1. Samuel Strong's bill of complaint No. 3531, in this court, against John A. Barber, Robert P. Dodge and P. A. Darneille, alleging *that certain fraudulent practices and exactions had been conducted and perpetrated against him by them whereby they had converted to their own use certain money belonging to him*. The case was regularly proceeded with, and resulted in a decree requiring Barber, Dodge and Darneille to pay \$2,115.92 to Strong.

At this time Dodge and Darneille were seized in fee simple as tenants in common of part of Lot 4, in Square 292, fully described in the bill of complaint, and John A. Barber owned in severalty certain other real estate hereinafter described.

On the 9th of November, 1875, Strong assigned his interest in the decree to Enoch Totten, who, on the 5th of June, 1879, ordered the marshal to levy *a. fi. fa.* on lots 96, 97, 98 and 99, in square 364, the property of John A. Barber, which levy was made. On the 10th September, 1879, John A. Barber paid Totten \$1,000, and took his receipt. This was a little more than one-third of the whole amount due at that time. On or about the 9th day of February, 1880, Totten agreed with the attorney of the defendant, M. C. Barber, who is the mother of John, to order a release of the levy on John's property, and to assign the decree to her, upon payment of the balance due upon it. The release of the levy on Barber's property was ordered, the marshal was directed to make a new levy for the balance due on the part of lot 4, in square 292, which had been owned by the defendants, Dodge and Darneille, jointly, at the time when the decree was rendered, the money was paid by Mrs. Barber's attorney, to Totten, a receipt was taken in her name, the decree was assigned to her in writing, and entered to her use on the docket.

Prior to the assignment to Mrs. Barber, but subsequently to the signing of the decree, Dodge and Darneille had conveyed the said part of lot 4, in square 292, to the complainant Herr, who at the time had actual notice of the decree against them in cause No. 3531.

When the marshal levied on part of lot 4, square 292, Herr filed the bill in this case, setting out the fraudulent character of the transaction out of which the indebtedness grew, claiming that the final payment to Totten had been made by John A. Barber, and not by his mother, and that the said part of lot 4, in square 292, could not be levied on until all of John A. Barber's property had been exhausted.

2. Upon the records of this court the decree, in cause No. 3531, stands regular in form, and unsatisfied. The assignment to Mrs. Barber, the entry to her use, the levy on part of lot 4, square 292, are all in due form, and unless this court interferes by injunction there is nothing to prevent a valid sale and conveyance by the marshal.

"This examination will be premised by stating the following principles of equity jurisprudence, which may be affirmed to be without exception ; that whosoever would seek admission into a court of equity must come with clean hands ; that such a court will never interfere in opposition to conscience or good faith." *Creath vs. Sims*, 5 How., 192.

"It is a principle in chancery, that he who asks relief must have acted in good faith. The equitable powers of the court can never be exerted in behalf of one who has acted fraudulently, or who, by deceit or any unfair means, has gained an advantage. To aid a party in such a case would make this court the abettor of iniquity." *Bein vs. Heath*, 6 How., 247 ; and see to same effect, *Bolt vs. Rogers*, 3 Paige, 154 ; *Harrington vs. Bigelow*, 11 Paige, 349 ; *Carey vs. Smith*, 11 Ga., 539.

If this bill, setting up their own fraudulent conduct and practices, had been filed by Dodge and Darneille, the court would not hear them at all, even if the result of such refusal should be to throw the whole debt upon them, instead of their fair and just proportion. This court would say to them, in the language of Mr. Justice Daniels in the case of *Creath vs. Sims*, above referred to, "however unworthy may have been the conduct of your opponent, you are confessedly *in pari delicto* ; you cannot be admitted here to plead your own demerits ; precisely, therefore, in the position in which you have placed yourself, in that position we must leave you."

But Herr is in no better position than Dodge and Darneille. He bought with full notice of their liability, and of the lien on their property, and of the nature of the transaction creating the liability ; and he can have no equity superior to theirs.

In the case under consideration there was no original equity between Dodge and Darnielle on the one hand, and Barber on the other. Dodge and Darneille could not have required Barber to pay Strong the whole debt, and to exonerate them. If the judgment had been levied on their property, they could not have compelled the judgment creditors

to resort first to Barber's property. As they had no such right themselves, they could not transfer such a right to the assignee. The assignment could not create a right in the assignee which the assignors did not possess. An assignee with actual notice can never acquire any rights superior to those of his assignor.

8. It is shown, also, by the record, that the money was actually furnished by Mrs. Barber; that it was delivered to Totten by her attorney for her, and a receipt and assignment taken in her name, and that it has never been repaid or secured to her in any way, except in so far as this assignment secures it. It is perfectly clear that the intention of the parties at the time when the assignment was made by Totten, was to effect a transfer of the decree, and not a payment or satisfaction of it.

Under these circumstances it can make no practical difference, that when Mrs. Barber entrusted the money to her son she did not understand the exact manner in which it was to be used, or did not intend to insist on its repayment by him. In a previous transaction of a similar nature she did not know that her son had given her a deed of trust to secure her, although it had been regularly executed and recorded. If, in the present instance, she intended to give the money to him he was not bound to accept it as a gift, but had a perfect right to use it in such manner as to secure its repayment; and the manner in which it was applied shows that he did not consider it a gift or accept it as such. If it was a gift originally he gave it back to his mother when he delivered it to her lawyer to be used in obtaining an assignment of the decree to her.

A court of equity will not construe such a transaction contrary to the intention of the parties to it, in the interest of persons who come into court alleging their own fraud and dishonesty, or of the assignee of such persons with notice. It will not, at the instance of such parties, and under such circumstances, disturb the just and equitable apportionment of the debt among the three joint debtors, which has been the practical result.

4. It has been decided that a release of a levy of an execution on personal property of sufficient value, operates as a satisfaction. But a release of a levy on real estate does not have that effect. *Wylie vs. Stanford*, 22 Ga., 385; *Smith vs. Walker*, 18 Miss., 584; *Peale vs. Bolton*, 24 Miss., 680; *Hoggshead vs. Carruth*, 5 Yerger, 227; *White vs. Graves*, 15 Texas, 184; *Shephard vs. Rowe*, 14 Wendell, 260; *Duncan vs. Harris et al.*, 17 Serg. & R., 436.

Mr. Justice HAGNER, after making the foregoing statement of the case, delivered the opinion of the court.

The evidence of Mrs. Barber is undoubtedly greatly in conflict with the averments in her answer. It appears, as undisputed in the case, that the first one thousand dollars paid by John A. Barber, on the decree, in September, 1879, was borrowed by him from his mother, and that he executed a deed of trust upon his other property to secure its repayment. As to that payment, therefore, there can be no question that it was made with the proper money of John A. Barber.

It is proved by Mrs. Barber, that the remaining sum of \$1,780 was also obtained from her by John A. Barber. She testifies that for that sum she had no security from her son, and that she did not expect any when it was given to him; that it had not been advanced in the nature of a loan; that it had not been furnished upon any understanding, expressed or implied, that it should be appropriated, in whole or in part, to the purchase of the decree; that she "gave him the money to do as he pleased with it;" that she "gave him the money as a present to do as he pleased;" that she "had been giving him money all her life, at least ever since the death of his father;" that "there was no agreement between them for its repayment;" that she "did not request or require him to devote any portion of it to any specific purpose;" that she had nothing, personally, to do with any of the steps which resulted in the assignment of the decree to herself;" "I did not," she says, "request it at all; my son gave it to me without any request; I did not ask him for it."

She also stated that it was her son who employed counsel to procure the assignment of the decree, and that she received from his hands the contract, which she signed with her solicitors, who had also been the solicitors of her son in the previous history of the case.

The first question for our consideration is, was the decree satisfied by its payment, in full, to Totten, the assignee of Strong?

The general principle is well settled, that the payment of an incumbrance by one whose duty it is to pay extinguishes it. So, payment made by one of several joint obligors works the satisfaction of a bond. *Bowie vs. Carroll*, 7 Gill, 34.

A judgment, upon its payment by one of the defendants, becomes *functus officio*. It perishes in fruition.

In this decree all the defendants were principals, and the duty to pay the whole of the debt devolved upon each, and a payment by either worked a satisfaction of the decree.

In *Hinton vs. Odenheimer*, 4 Jones, North Carolina Equity Reps., 407, a creditor brought suit against two persons constituting a partnership. They gave bail for their appearance, according to the law as it then stood; one of them afterwards left the State, and judgment was entered against both partners. The resident partner paid the debt, and the judgment was entered to his use. He then procured a judgment in the same case against the surety on the bail bond of his absconding partner, and issued an execution upon it. The surety filed a bill in equity to restrain the enforcement of the execution; and the court granted the injunction. On appeal, the appellate court sustained the decree below and said: "There is no principle on which, after satisfaction of the judgment on the partnership debt by one of the partners sued, equity ought to extend or preserve the vitality of the legal security, under the guise of an assignment, so as to charge the bail of the other partner. The contract of the defendant is with the creditor alone. After he is paid, he has no further interest in the matter."

A statute of Maryland of 1763, chap. 28, sec. 8, which is in force in this District, provides: "That where a judgment

has been recovered against the principal debtor and sureties, and the judgment has been satisfied by one surety, the creditor shall be compelled to assign the judgment to that surety, and such assignee shall be entitled unto and have in his own name the same execution against the principal debtor, by virtue of such assignment, as the creditor might have had."

This statute made a change in what was the common law of the subject before its passage, but it is to be remarked that it applies only to the cases where the payment is made by a surety, and on judgments, not decrees.

And it has been decided (*Creager vs. Brengle*, 5 Harr. & John., 234), that if the payment is made by the surety to an assignee of the judgment, such assignee has no authority to make a further assignment to the surety; since the act only contemplates payment by the surety to the original creditor, and an assignment by him.

2nd. The same rule will apply if an attempt is made after the payment of a decree by one of the defendants to have it entered to the use of a third party for the benefit of the surety.

Such would not be the case where the payment is made *bona fide* by a third person for whose use the judgment is entered; and if Mrs. Barber had paid the \$1,780 herself, on her own account, and with the distinct purpose of having the decree, to that extent, entered for her use, such an assignment would have given her a valid title to proceed upon the judgment. But we are satisfied, from an examination of the testimony in connection with all the facts, that this money, like the \$1,000 first paid, was really lent or given by Mrs. Barber to her son then, to dispose of as he might see fit as his own property, and without any existing purpose on her part to have it secured to her by an assignment of the decree for her use. The entry, therefore, of the decree to the use of Mrs. Barber was, in our opinion, but an attempt on the part of John A. Barber to do, by indirection, under the cover of his mother's name, that which he could not have done without such interposition.

3rd. There is a further point made in the case, on the part

of the complainant, arising out of the nature of the transaction which formed the basis of the decree in the case of *Strong vs. Barber*.

The matter in controversy in that case was an alleged breach of trust on the part of the defendants who, it is said, must therefore be regarded as joint *tort-feasors*.

The principle that there can be no contribution, at law, enforced by one *tort-feasor* against the other wrong-doers, is limited by the more modern authorities to cases where the transaction, out of which the judgment arises, involves moral turpitude.

The subject is discussed at length in the case of *Bailey vs. Bussing*, 28 Conn., 455. In that case contribution was allowed at law where the defendants, though technically *tort-feasors*, were only such because they were the owners of a stage coach, which was upset by the carelessness of the driver. The absence of any fraud, or moral wrong, exempted the case from the operation of the general rule.

And in *Seltz vs. Unna*, 6 Wallace, 386, it is said, "equal contribution to discharge a joint liability is not inequitable even as between wrong-doers, although the law will not, in general, support an action to enforce it where the payments have been unequal."

It appears in the history of the present case, that John A. Barber had filed a bill in equity, in July, 1879, against his co-defendants, and Herr, Strong and Totten, for contribution, but the bill was dismissed after the defendants had answered or demurred. Whether such a bill could have been sustained if filed after entire payment, is a matter with which we are not concerned. The proceeding by Mrs. Barber to enforce payment to her by execution upon the satisfied decree, for the reasons we have stated, is untenable.

4th. It was insisted upon the part of the defendants, in the argument, that Herr purchased from Dodge and Darneille with full knowledge of the existence of Strong's decree, and the nature of the transaction creating that liability, and that, as Dodge and Darneille could not be heard in a court of equity on an application to exonerate their property from

contribution to John A. Barber, neither could Herr be considered as standing in a better position than his grantors, or having any equity superior to theirs, and that Herr, therefore does not come into court with clean hands, and can obtain no relief here.

It is true that Herr must be considered as having purchased with perfect knowledge of Strong's decree ; but it does not follow that that fact places him, to all intents, in the identical position of his grantors. As to the land he purchased he is, of course, in no better attitude, and whatever liabilities justly attached to that land at the time of his purchase remain chargeable against it now. But in the same way, whatever immunities can be considered as appertaining to it at the time, still equally surround it in Herr's possession.

As John A. Barber, one of the joint *tort-feasors* and defendants under the decree, could not have enforced contribution under the decree out of the lands of Dodge and Darneille while in their possession, neither can he himself, nor another for his benefit, enforce it now when the land has passed into the possession of Herr.

A proprietor of land may have incurred liability by his acts while proprietor ; as, for example, by digging coal or minerals upon it in such wise as to endanger the safety of his neighbor's property. The purchaser of the land, however, would not be held liable for such antecedent acts of his vendor, although any judgment rendered in respect to those acts, antedating the purchase, would remain binding upon the land in the hands of the purchaser.

So, where, as in a reported case, two fathers agreed to make advances upon a treaty of marriage between their children, one promising to convey a particular farm to the married couple, and the other to advance a sum of money to stock it. After the marriage, the latter paid the money according to his agreement, but the former refused to convey the farm, and sold it to a third person. That purchaser could not be held liable upon the unperformed contract ; although, if the land had remained in the hands of the

father, the court might have decreed specifically that it should be conveyed according to the agreement.

Whatever liability was fixed and binding upon the land of Dodge and Darneille, when it was purchased by Herr, remained a charge upon it after Herr's purchase ; but nothing more.

Much stress has been laid upon the alleged hardship of this case. It is but proper that courts should, at times, recall the response which their predecessors have made when this argument has been much pressed upon them as a reason for departing from fixed principles. This is well expressed in the case of *Boyd vs. Parker*, 43 Md., 201 : "The consideration of the hardship of the particular case sometimes leads the court 'to depart from precedents and make shipwrecks of legal principles.' To these it is our duty to adhere, and we have no right to depart from them to meet what we may think is the abstract justice of any particular case."

The decree below is affirmed.

WILLIAM E. CLARK vs. HENRY KRAUSE ET AL.

EQUITY. No. 8,151.

{ Decided October 8, 1863.

{ The Chief Justice and Justices HAGNER and Cox sitting.

1. The near relationship existing between the grantor and grantee, in a case of an alleged fraudulent conveyance, may, under certain circumstances, be considered as a make-weight of importance when taken in connection with other established suspicious facts; but, standing alone, it amounts to nothing as evidence of fraud.
2. Before a sale will be set aside for inadequacy of price alone, it must appear that the price was so grossly inadequate as to shock the moral sense, and create at once upon its being mentioned a suspicion of fraud.
3. A debtor in failing circumstances may prefer one creditor to another if the preference is *bona fide*.
4. Where a conveyance of real estate is attacked as fraudulent, possession of the property after the execution of the deed, is not without weight in determining the question of fraud, and in a doubtful case it may strengthen any just suspicion arising from other causes. But it does not *per se* raise a presumption of fraud as it does in the case of personal estate, where possession is *prima facie* evidence of ownership.
5. A delay of three weeks between the execution and recording of a deed is not so unusual or suspicious a circumstance as to amount to evidence, especially where there is nothing to show that any new debts were incurred during the interval.
6. A deed which names the purchase price and acknowledges the payment thereof, is itself an efficient and compendious receipt for the purchase money; therefore, where payments had been made and receipted for in various instalments prior to the execution of such a deed, the loss or destruction of these antecedent receipts is no evidence of fraud, especially where the parties appear to be persons unfamiliar with matters of business.
7. Where the complainant calls the defendants (the alleged fraudulent grantor and grantee) as witnesses, he thereby vouches for their competency and credibility, and is estopped to assail their statements for the lack of either of these qualities, though he is of course at liberty to call others who may show that the defendants are mistaken in their statements.
8. *Quere*, Whether the examination of a defendant by a plaintiff does not operate as an equitable release to him so far as regards the matter as to which he is interrogated and therefore prevent any decree against him except as to matters wholly distinct from those as to which he was examined.
9. When the charge of fraud is unsupported by the testimony of a single witness for the plaintiff, unfavorable inferences are not to be drawn from the failure of the defendant, who gives his testimony as plaintiff's witness, to explain circumstances of alleged suspicion supposed to be inconsistent with his positive statements.
10. Application to the court to compel an answer is the proper course where a witness is recusant, and the failure to make such application may well be taken as an abandonment of the demand for the witness' testimony.
11. The evidence act is intended simply to relieve the particular disabilities enumerated, that the party called is interested or is a party; but the disabilities arising from want of age, or mental infirmity, or infamy, &c., or that the witness is called to testify for or against her

husband (except in particular cases) remain, notwithstanding the witness may be a party to the suit, or may be interested in the result. 12. Where a defendant is brought into court to meet a charge of fraud, and effectually repels it, the complainant cannot change his ground, and obtain other relief, based upon the proof of constructive fraud, or other equities supposed to be established by the evidence.

STATEMENT OF THE CASE.

The complainant, a judgment creditor of the defendant Krause, filed the bill as such in this case, to set aside an alleged voluntary and fraudulent conveyance of real estate, made by Krause and wife, to defendant Michael Joachim, April 18, 1881, and recorded May 10, 1881. The deed named the consideration as \$3,500 and acknowledged the receipt thereof. The bill averred that at the date of the deed, Krause was indebted to the complainant, and to other persons; that the grantors continued to reside on the property as before the alleged conveyance, the grantee never having taken possession; that said grantee is a brother-in-law to said Krause; a printer by trade, and of small means, and paid no consideration for the property, but that the conveyance was made to hinder and delay creditors in the collection of their debts.

The bill called upon the defendants to answer without oath, the plaintiff expressly waiving the same.

The defendants answered, as required, without oath, denying all fraud. Joachim admitted that he was a brother-in-law of Krause, and a printer; and claimed to own other real estate (three houses) worth about \$4,000. He also claimed that the transfer by the deed from Krause attacked by the bill, was *bona fide*; that Krause owed him, for moneys loaned at various times, \$2,500—for which he gave credit, and paid \$1,000 in cash, on April 18, 1881. That Krause remained in the possession of said property, as his tenant, at \$20 per month, agreeing in addition to pay taxes, and keep the property in repair.

Krause admitted judgment, relationship of defendants, residence, &c., and denied that the deed was voluntary or fraudulent, but averred it to be *bona fide*, and in consideration of \$3,500—\$2,500 of which he owed Joachim for bor-

rowed money, and \$1,000 of which Joachim paid in cash. He also claimed to be the tenant of the property, the rental being \$20 per month, with payment of taxes and repairs in addition. Mrs. Krause, who had joined with her husband in the execution of the deed, answered, denying any knowledge as to the material allegations of the bill.

Issue was joined on the answers and the complainant, to prove his case, called the defendants, including Mrs. Krause, as witnesses in his (plaintiff's) behalf. Both Joachim and Krause testified accordingly, and both denied positively all the fraud charged. Their testimony was voluminous and entered upon all their business transactions claimed by the plaintiff to have relation to the question of fraud in the conveyance. Much of this testimony the plaintiff on the hearing insisted contained contradictions and evidence of suspicion sufficient to establish the charge of fraud. But the conclusions of fact reached by the court appear in the opinion. No other witness, excepting two or three upon minor points, were examined by the plaintiff. The defendants offered no testimony, but rested their case upon their testimony as witnesses when called by the plaintiff. It should be stated that Mrs. Krause, when called by the plaintiff, refused to answer the questions of counsel, on the ground that she was neither competent nor compellable to testify in a suit in which her husband was a party. No application was made to the court to compel her to answer. The other facts necessary to an understanding of the case appear in the opinion of the court.

On the hearing, the court below decreed that complainant's claim be a lien on the property prior to all interest of defendants, *except* such sum as may have been justly due Joachim from Krause when the deed was made, or actually paid in consideration thereof; and as to such amount, the deed was declared a mortgage, and the cause referred to the auditor to ascertain, on further proof, what sum of money was due Joachim, or paid by him; and reserving all further matters of decree until the coming in of the auditor's report.

From this decree both parties appealed.

EDWARDS & BARNARD for complainant :

The defendants are required to produce full evidence on their part to support a transaction where there are so many suspicious circumstances. Bump on Fraud. Conv., 31, 55 ; Hunt vs. Blodgett, 17 Ill., 586 ; Clements vs. Moore, 6 Wall., 299, 315 ; Peebles vs. Horton, 64 N. C., 874 ; Sherman vs. Hogland, 73 Ind., 472 ; Rogers vs. Hall, 4 Watts, 862.

Even the answers are put in without oath, though the waiver of oath in the bill could not deprive the defendants of the privilege and benefit of sworn answers. Clements vs. Moore, 6 Wall., 314.

A wife is competent to testify in such case as this, and her failure to answer the bill, or interrogatories, is a suspicious circumstance. Sherman vs. Hogland, 73 Ind., 472 ; 1 Phillips on Evidence, 93, 94, 517 ; Casteel vs. Casteel, 8 Blackf., 240 ; Birdsall vs. Dunn, 16 Wis., 235.

From the statements and conduct of the parties defendant herein, and the positive proof taken on behalf of complainant, we submit that the decree of the Special Term does not go far enough. We ask that it be modified, to declare the conveyance absolutely void as to complainant, and to direct a sale of the property to pay his debt, if not paid voluntarily within a limited time to be fixed by the court.

FRANKLIN H. MACKEY for defendants :

1. Deeds are *prima facie* evidence of the verity of their contents, and when they are supported by the positive answer of the defendant the testimony to set them aside ought to be so clear and explicit as to leave scarce a doubt on the subject. Faringer vs. Ramsey, 2 Maryland, 875.

This doctrine was affirmed in Glenn vs. Grover *et al.*, 3 Maryland, 226, and in Stockett vs. Holliday, 9 Maryland, 481, and again in Moore vs. Blondheim, 19 Maryland, 176, the court citing and affirming the two preceding cases.

2. The fact that Krause was indebted to the complainant at the time of the conveyance to Joachim (who was the largest creditor) cannot affect the validity of the deed, if it

was otherwise *bona fide*. *Glenn vs. Grover, supra*, and *McColm*, 3 Md., 225-227. And this court has settled this question in *Morrison vs. Shuster*, 1 Mackey, 201, where it decided that a debtor in failing circumstances may prefer one creditor to another if the assignment be otherwise *bona fide*.

3. Under the pleadings in this case the decree could not stand, even if the evidence supported it.

Let it be remembered that the bill charges actual and intentional fraud. The conveyance, says the bill was "voluntary" and made "for the purpose of delaying, hindering, cheating and defrauding the complainant," and it prays relief on that ground, and no other.

Now, the decree itself practically repudiates the charges of fraud, and yet goes on to give relief utterly inconsistent with the allegations and prayers of the bill; in other words, it declares Joachim a first mortgagee of the property, and gives the complainant the equity of redemption. A relief which the bill does not so much as hint at, and which not a word in the answers and testimony can justify.

The Supreme Court of the United States in *Eyre vs. Potter*, 15 How., 42, says:

"Where a bill charges actual and intentional fraud, and prays for a relief on that ground, the complainant cannot, under the prayer for general relief, rely on circumstances which may amount to a case for relief, under a distinct head of equity, although those circumstances substantially appear in the bill, but are charged in aid of the actual fraud."

Again:

"If a bill charges fraud as the ground of relief, fraud must be proved. The proof of other facts, though such as would be sufficient, under some circumstances, to constitute a claim for relief under another head of equity, will not prevent the bill from being dismissed." *Fisher vs. Boody*, 1 Curtis C. C., 206.

Even the complainant recognizes the inconsistency of the decree and has therefore himself appealed from so much of it as declares Joachim a first mortgagee.

Mr. Justice HAGNER delivered the opinion of the court.

The bill in this case was filed by William E. Clark against Henry Krause and wife and Michael Joachim. It alleges that the defendant Krause, in April, 1881, was indebted to complainant in the sum of about eighteen hundred dollars; that he was then possessed of an acre of land on the Seventh street road in this District, which, on the 18th of that month he conveyed, for the alleged consideration of \$3,500, to his brother-in-law, Joachim; that Joachim did not enter upon the property, but it remained in the possession of Krause, as it had been before the deed; that Joachim was a printer by trade, possessed of small means, and that no consideration actually was or could have been paid by him for the property; that afterwards a judgment was obtained by the complainant against Henry Krause, upon which a writ of *fiery facias* was issued, which was returned *nulla bona*. The bill prays that the defendants answer, but not under oath; that a decree be passed to set aside this conveyance as voluntary and fraudulent, and a trustee be appointed to make sale of the property for the payment of the debts of complainant and the other creditors of Krause.

The defendants answer without oath, as suggested; the wife disavowing all knowledge of the matters alleged, and Joachim and Krause substantially giving the same statement of the transaction. They admit their relationship; that after the execution of the deed Krause remained in possession of the property, but they say that his possession was as tenant of Joachim; and they deny positively that the deed was fraudulent in any respect, and insist that the transaction was an honest one throughout; they aver that some time before the deed Joachim had lent Krause, his brother-in-law, various sums amounting to about \$2,500, and that this loan formed part of the consideration of the sale; that the difference between that sum and the \$3,500 mentioned in the deed was paid in cash, and the deed was thereupon executed, acknowledged and recorded according to law. With respect to the charge that Joachim was a man of small means and unable to make such a purchase, they

say that he was in fact possessed of considerable property, and that at the time he bought the farm he owned three houses worth at least \$4,000.

Upon these denials by the defendants, the complainants went to proof.

Before proceeding to its examination, it may be well to refer to some of the general principles which control the courts in considering whether sufficient proof has been offered to invalidate a deed assailed for fraud. These are well expressed in the excellent work of Mr. Bump on *Fraudulent Conveyances*, which was so often referred to by the counsel for the complainant in the argument. The author reminds us, on page 575, that the recitals in a deed are *prima facie* correct; that the burden of proof rests upon the creditor assailing the deed (p. 581); and again, on page 584, "If the creditor does no more than create an equilibrium, he fails to make out his case. Mere suspicion leading to no certain results, is not sufficient. A legal title will not be divested upon mere conjecture, or evidence loose or indeterminate in its character." "The proof must be clear and satisfactory; so strong and cogent as to satisfy a man of sound judgment of the truth of the allegation." P. 585.

"In the proof of a fraudulent intent, the same general rule prevails in equity as at law. The law does not presume fraud, but it must be established by evidence * * * The difficulty of demonstrating the intention from the overt acts and conduct of the parties, furnishes no reason for the assertion of the power by a judge, guided by no more certain rule than his own arbitrary conclusions, to presume a fraudulent intent from his own vague suspicions of the nature and character of the transactions, unassisted and uncontrolled by any certain and fixed principles." *Sherman vs. Hogland*, 73 Indiana, 472.

In *Jaeger vs. Kelley*, 52 N. Y., 274, the court says: "To invalidate a sale, tangible facts must be proved from which a legitimate inference of a fraudulent intent can be drawn. It is not enough to create a suspicion of wrong, nor should a jury be permitted to guess at the truth."

Tested by these rules, has the complainant proved his case so as to entitle him to relief at our hands? No witnesses were called by the defendant, five for the complainant. Three of these were the defendants themselves, and the other two were the complainant and his clerk.

Laying aside for the present the testimony given by the defendants, we will consider the sufficiency of the proof of the different matters relied upon as badges of fraud, in the light of the other testimony, and of the admissions in the answers.

The first prominent undisputed fact is the near family connection between the grantor and the grantee, as brothers-in-law. That fact certainly might, under certain circumstances, be justly considered as a makeweight of importance, when taken in conjunction with other established suspicious facts. But the mere existence of relationship constitutes no reason why persons occupying that position should be debarred from business dealings with each other; and standing alone it amounts to nothing as evidence of fraudulent intent.

Next, as to the value of the property. It is proved by direct evidence that it was assessed at \$3,500, which is the sum named in the deed, and certainly there is no general complaint that the assessments are too low. It is true that Mr. Clark (who, as he charges, will lose his claim utterly unless this deed is set aside), says he would give \$5,000 for the property, provided his debt is to be credited to him as part of that sum, which would reduce the amount to be paid by him to about \$2,000. But the well-established rule as to setting aside sales upon the ground of inadequacy of price may well be applied here, that before a sale will be set aside for inadequacy alone, it must appear that the price was so grossly inadequate as to shock the moral sense and create, at once upon its being mentioned, a suspicion of fraud. Clearly such is not the case here.

Again, much reliance is placed upon the fact that the

party grantor was greatly involved, and had been sued, at the time the conveyance was made ; but there is no admitted feature of illegality in this, since it is abundantly settled that a debtor in failing circumstances may prefer one creditor to the others, if the claim of the preferred creditor is *bona fide*, and honestly due. *Morrison vs. Shuster*, 1 Mackey, 290.

Another fact much insisted upon as strongly evincive of fraud, is, that the grantor continued in undisturbed possession after the execution of the deed. Where possession of personalty is retained by the vendor, after an alleged sale, that circumstance is justly held to be one of importance upon the question of *bona fides*, since possession of personal property is generally regarded as a badge of ownership. But such is not the case with respect to the possession of real estate. Mr. Bump (p. 177) states the difference in principle between the cases in these words: "Possession of real estate is not without weight, and in a doubtful case may strengthen any just suspicions arising from other causes. But it does not *per se* raise a presumption of fraud as it does in the case of personal estate, where possession is *prima facie* evidence of ownership. The same rule does not apply to real estate. Possession is not there deemed evidence of ownership. The laws of most nations require solemn instruments to pass the title to real property. The public look not so much to possession as to the public records, as proofs of the title to such property. . The possession must, therefore, be inconsistent with the sale and repugnant to it in terms or operation, before it raises a just presumption of fraud."

Next, as to the delay in recording the deed. There was an interval of three weeks between the date and the recording, but this was not sufficiently prolonged to justify the conclusion of fraudulent concealment that the complainant seeks to draw from it. If precipitancy had been shown in the recording, that fact might more properly have been insisted on as a circumstance of suspicion ; but the delay was not so unusual or suspicious as to amount to any evidence of fraudulent purpose, especially as there is nothing to show that any new debts were incurred during that time.

There remains the further circumstance testified to by the complainant Clark, that Krause told him after the deed had been executed that he owed nobody but him (Clark). Assuming that Clark properly understood what was said by this foreigner, in the market, in broken English, that statement would, in conjunction with other circumstances of suspicion, be entitled to weight; but people easily deceive themselves in such matters where they are interested, and it may be that what Krause really said was that there was nobody else *pressing* him. For Clark knew perfectly well Krause was at that time indebted to the Market House Company, and the indebtedness was the subject of the same conversation between Krause and himself. Krause certainly did not mean to deny what he admitted at the same moment.

And if the deed to Joachim was a fair transaction, Krause might well have said he owed nothing to Joachim after its execution since the sale had discharged the debt.

Passing to the testimony of the defendants, the question arises, whether that proof, considered with the testimony of the other witnesses, is sufficient to authorize the court to set aside this conveyance. The complainant produced these three defendants as witnesses, to prove that the sale was fraudulent, without consideration, and designed to cheat or defraud creditors. But Henry Krause and Joachim swear distinctly that it was not a fraudulent sale; that it was not made without consideration, and was not designed to defraud; and thus the complainant is met by this asseveration, out of the mouths of his own witnesses, from which they never depart, from the beginning to the end, of their examination. But the complainant insists that, notwithstanding these witnesses fail to sustain his allegations, but testify to the very reverse, they also make statements very inconsistent with the conclusions they thus announce; and that the court is at liberty to weigh these inconsistent statements against each other, and thereby effectively to convert the defendants' positive asseveration of the *bona fides* of the transaction, into an avowal that it was fraudulent throughout;

for it would not aid the complainant simply to find that the alleged discrepancies only destroy the value of the defendants' evidence. We think this position cannot be sustained. These witnesses are produced by the complainant, and are vouched by him to establish his case. Upon the main point—the *bona fides* of the transaction—they express no hesitation or doubt. Suppose these witnesses, instead of being the defendants, had been disinterested persons, who had been produced on the part of the complainant to prove that the sale was without consideration, and that the deed was fraudulent and should be set aside; and that, when they were examined, they had testified distinctly that the transaction was not fraudulent, but was honest and made in good faith. Could it be claimed that alleged inconsistencies, brought out by the complainant's examination of his own witnesses, could avail to convert their positive conclusions effectively into proof so opposite in character that it should be taken by the court as full evidence of fraud?

Nor do we think the inconsistencies and omissions pointed out in the testimony are of such sinister import as to weaken the conclusion of the witnesses. It is said the witnesses should have produced receipts evidencing the payment by Joachim to Krause. The deed from Krause contained an efficient and compendious receipt for the purchase money; and the loss or destruction of the several antecedent receipts would be considered nothing unusual in the experience of business men more familiar with such matters than these parties seem to have been.

There was no obligation upon the complainant to call the defendants as witnesses, and after he had voluntarily done so, thereby vouching for their competency and credibility, he was estopped to assail their statements for the lack of either of these qualities; though he was, of course, at liberty to call other witnesses who might show that the defendants were mistaken in their statements. This he did not attempt to do, although the defendant disclosed the names of several persons who they alleged had knowledge of the facts.

It is urged that the peculiar character of the transactions,

resting so greatly in the knowledge of the defendants, imposed upon them a special obligation to disclose its every feature, and that their failure to explain all the circumstances of suspicion should create in the mind of the court a most unfavorable impression as to the *bona fides* of the deed. In the cases cited in support of this position it will be observed that the party impeaching the transaction had offered evidence tending to show *mala fides*, and thus imposing upon the parties to the alleged fraud, the duty of meeting this proof by counter evidence: and it was in this state of case that the courts criticised unfavorably their failure to offer testimony in rebuttal. Thus in *Clements vs. Moore*, 6 Wall., 299, the complainant had adduced proof that the grantee knew when he received the conveyance that the grantor's object was to deprive certain of his creditors of all chance of payment from the property conveyed; and the court properly held that if the parties to the conveyance made no effort to meet this by counter-evidence, when they must have possessed the amplest knowledge of the surroundings of the act, their failure to do so, would operate almost as an admission of the charge. But the court did not in those cases mean to say that this proof was to come from the parties to the deed, and by their own testimony. When the case in 6 Wallace was decided, the parties to the suit were not competent witnesses, on their own offer. And as the law stood then, and as it stands now in the text books upon equity evidence, when the complainant examined a defendant, after he had been admitted as a witness, by order of court, no decree could be passed against him if the examination extended to any matters actually involved in the decree. The rule is thus stated in 3 Greenleaf Ev., § 316. "The examination of a defendant by a plaintiff ordinarily operates as an equitable release to him, so far as regards the matters as to which he is interrogated. No decree can, therefore, be had against him, except as to matters wholly distinct from those as to which he was examined. The reason of this rule is that it is inconsistent to allow the plaintiff to call on the defendant to assist him with evi-

dence in his cause, and at the same time to act against him with respect to the same matters." The author states the exceptions to the rule, which arise where the defendant who is examined is only a formal party, as trustee, &c., or where a decree *pro confesso*, has been obtained against him.

In 2 Danl. Chy. (451), the position is thus explained: "For the rule of the court is that whenever you examine a defendant or a witness, you cannot pray an adverse decree against him, because that would be charging him on his own evidence, which if you do, would be a great temptation to defendants to forswear themselves." Gurley's Eq. Ev., 340.

And this remained the rule in England, until the passage of the 6 & 7 Victoria, Ch. 35

The same reasoning is assigned for the rule in Maryland, *Lingan vs. Henderson* 1 Bland, 268, and in *Alexander's Practice*, 72.

We have found no ruling as to the effect of our evidence acts, admitting parties to testify, upon this principle of equity evidence. In *Texas vs. Childs*, 21 Wall., 488, the Supreme Court determined that a defendant was not only admissible as a witness in an equity cause, but that he was also compellable to testify upon the demand of the complainants; but the case does not decide as to the effect of the evidence, or whether the complainant could procure a decree against the defendant in respect of the matters as to which he had seen fit to examine him. In the case before us, no order to examine the defendant had been obtained.

Without intending to decide the question thus suggested, it at least is evident that the analogies as well as the reason of the law are against the ascription to the defendant of any especial obligation in giving his personal testimony on the demand of the complainant, to create a case for his opponent by acquiescing in the imputation of bad faith, while the charge remains unsupported by the testimony of a single adverse witness; or that unfavorable inferences are to be drawn from his failure to strengthen circumstances of alleged suspicion, supposed to be inconsistent with his positive statements.

Another circumstance much relied on by the complainant is the refusal of the wife of Krause to testify on the demand of the complainant.

No application was made to the Equity Court to compel her to answer, which is the proper course where a witness is recusant. The failure to make such application might well be taken as an abandonment of the demand for her testimony.

But surely a charge of fraud cannot be considered as proved because witnesses who are called to establish the allegation refuse to open their mouths. Besides, it seems to be in the highest degree doubtful whether, laying aside the evidence acts, Mrs. Krause was either competent or compellable to testify as a witness on the demand of the complainant.

Her husband was a co-defendant, and he objected to her examination.

The provision in the act that a party in interest or to the record may be examined, has nothing to do with this question. As expressed in *Lucas vs. Brookes*, 18 Wall., 453: "The objection to a wife testifying on behalf of her husband is not, and never has been, that she has any interest in the issue to which he is a party. It rests solely upon public policy, so that the statute has no application."

The evidence acts simply relieve the particular disabilities enumerated—that the party called is interested, or is a party; but the disabilities arising from want of age, or mental infirmity, or infamy, &c., or that the witness is called to testify for or against her husband (except in particular cases), remain, notwithstanding the witness may happen to be a party to the suit, or may be interested in the result. This court so decided in General Term, in *Burdette vs. Burdette*,* where the husband and wife were held incompetent to testify in an application for a divorce *a vinculo*. See *Gresley's Eq. Ev.* 841.

Nor would the husband's assent have rendered the wife a

**Ante*, p. 469.

competent witness. 2 Taylor's Ev., § 1282. The author states that Lord Hardwicke, in *Barker vs. Dixie*, Cases Temp. Hardw., 264, refused to admit a wife to testify against her husband, notwithstanding his assent; and proceeds, "and this opinion has been followed in America, apparently upon the ground that the interest of the husband in preserving the confidence reposed in her, is not the sole foundation of the rule, but that the public have also an interest in the preservation of domestic peace, which might be disturbed by her testimony notwithstanding his consent."

It is unnecessary to review all the evidence at length here, but upon a careful consideration of the allegations and proof, we have no hesitation in declaring that the allegations of fraud in the bill are not sustained. It would therefore follow that the bill should be dismissed.

The decree below adjudged that the complainant's judgment was due by the defendant Krause and it was declared to be a lien upon the land, subject only to such sum as was actually due to Joachim by Krause for loans and advances, and further that the deed to Joachim should be held to stand as a mortgage to secure the amount justly due to him by Krause when the same was executed. It is insisted upon the part of the complainant that this feature of the decree below should be preserved and that the auditor should be empowered to make such ascertainment.

But it is evident that such a provision would effectively be setting the deed aside as fraudulent, by indirection, and this we have decided should not be done, directly.

Again, there is no prayer in the bill for any such relief. The bill plainly impeaches the deed and prays its destruction upon the allegation of actual fraud. It is well settled by authority that where a defendant is brought into court to meet such a charge, and so effectually repels it that the court would not be justified in holding that the averment is proved, the complainant is not at liberty to change his ground, and obtain other relief, based upon the proof of constructive fraud, or other equities supposed to be established by the evidence. In the language of the circuit court in *Fisher vs. Boody*, 1 Curtis C. C., 206 :

"If a bill charges fraud as the ground of relief, fraud must be proved. The proof of other facts, though such as would be sufficient, under some circumstances, to constitute a claim for relief under another head of equity, will not prevent the bill from being dismissed."

And the Supreme Court in *Eyre vs. Potter*, 15 How. 42, says :

"Where a bill charges *actual and intentional fraud*, and prays for a relief on that ground, the complainant cannot, under the prayer for general relief, rely on circumstances which may amount to a case for relief, under a distinct head of equity, although those circumstances substantially appear in the bill, but are charged in aid of the actual fraud."

Such was the ruling of this court in the recent case of *Federich vs. Christiani*.

If the deed here assailed is fraudulent in fact, there could be no justification for a court of equity to sustain any part of it ; and if it is held to be not fraudulent, then the grantee's right to his property cannot be impaired by fastening upon his land a judgment subsequent to the conveyance.

The only cases where an equity court undertakes to decree indemnity, are those where there is no charge of actual fraud, but an averment of some manner of constructive fraud, as where the grantee paid a grossly inadequate price for the property, as in *Washington vs. Bullitt*, 6 Md., 172, and *Drury vs. Cross*, 7 Wall., 305 : Bump on Fraud. Con., 597.

The decree below is therefore reversed, and the bill dismissed with costs.

INDEX.

ABATEMENT. See *Married Women*, 4.

ACCOUNT. See *Use and Occupation*, 1.

ACCOUNT, ACTIONS OF. See *Auditor*, 1, 2.

ADMINISTRATORS. See *Executors and Administrators*.

AGENCY. See *Principal and Agent*.

ALTERATIONS OF WRITINGS. See *Evidence*, 7.

APPEALABLE ORDERS. See *Attorneys*, 3.

An order passed by the justice holding the Circuit Court, vacating a judgment rendered *ex parte*, at a previous term, and awarding a new trial upon the merits, is not an appealable order within the provision of Section 722 of the Rev. Stats. D. C. *Phillips v. Neyby*, 236.

ASSIGNMENT. See *Evidence*, 9; *Vendor and Vendee*, 1, 2.

The Maryland act of 1763, chap. 23, sec. 8, providing that where a judgment has been recovered against principal debtors and sureties and the judgment has been satisfied by one surety, the creditor shall be compelled to assign the judgment to him, is in force in this District, but it applies only to cases where payment is made by a surety on judgments, and not to decrees. *Herr v. Barber*, 545.

ATTACHMENT.

1. The landlord has no right to an attachment against his tenant's chattels which have been removed from the premises before the rent is due. His remedy is by judgment against the tenant and execution to be levied upon such chattels, or any of them, in whosoever hands they may be found. *Wallack v. Chesley*, 209.
2. Circumstances under which an attachment for rent may be issued by the landlord against the goods and chattels of the tenant. *Id.*
3. Notwithstanding the act of Congress of April 29, 1878, providing for the recording of deeds, &c., property in the possession of one who has in good faith purchased and paid for it, but has failed to record the conveyance, is not liable to attachment in a suit by a creditor against the absconding vendor, when it appears that as between the vendor and vendee the entire equity in the property has passed to the latter; the statute regulating attachment proceedings permits the plaintiff to attach only the property of the defendant, not the property of some one else. *United States v. Horogate*, 408.

ATTORNEYS.

1. Before judgment, the parties to a pending suit may settle it between themselves without considering either the wishes or the interest of the attorneys. *Lemont v. Railroad Company*, 502.
2. Plaintiff brought an action of tort to recover damages for injuries received. Pending the suit, plaintiff and defendant, without the knowledge of plaintiff's attorneys, settled the case. Plaintiff then gave defendant an order on the clerk of the court to dismiss the suit, which being filed, plaintiff's attorneys moved the court to set the cause down for trial notwithstanding, on the ground that the settlement was collusive, and was made with knowledge on the part of the defendant that the plaintiff's attorneys were interested in the case to the extent of their fees for services. An affidavit accompanied the motion showing that the plaintiff had agreed to pay his attorneys a contingent fee of thirty-three per cent. of the amount that should be recovered. The court thereupon passed an order that defendant should pay to plaintiff's attorneys one-third of the sum for which the case had been settled, and in default thereof the entry of dismissal should be struck out and the cause set down for trial. On appeal this court reversed the order, *holding*:
That the court will not interfere to enforce in a summary way through the original suit, the collateral engagement of a client for the compensation of his attorney, but will leave the latter to his common law remedy. *Id.*
3. Whether the order of the court below was an appealable order, *quære. Id.*

AUCTION SALES. See *Building Associations*, 1, 2.

AUDITOR.

1. Where, in a reference to an auditor under the Act of Maryland, 1783, ch. 80, the proceedings before the auditor are such as in actions of accounts, the right of hearing before the court as to all questions of law, and of trial by a jury upon all matters of fact, is to be preserved to the contestants. *McCullough v. Greff*, 361.
2. And where the auditor undertakes to decide all questions of fact, it would seem to be clearly against the spirit of the statute to admit the report before the jury even as *prima facie* evidence of the truth of its assertions or conclusions. *Id.*

BANK CHECKS. See *Laches*.

BANKS. See *Married Women*, 5-9.

1. The act of Congress of June 30, 1877 (19 St., 94), is substantially an enactment that the acts of Congress relating to national banks, including the provisions of Section 5154, providing for the conversion of banks into national banks, shall be applicable to *savings* and other banks in this District, except that savings banks ex-

BANKS (*continued.*)

- isting at the time of the passage of the act are not required to have a capital of \$100,000 in order to be converted into national banks. It was competent, therefore, for a savings bank, organized in this District under the General Incorporation acts of May 5, and June 17, 1870, R. S. D. C., § 553, to avail itself of the law for converting banks into national banks. *Keyser v. Hitz*, 473.
2. The certificate of the Comptroller of the Currency is conclusive as to the regularity of the proceedings by which any bank has been converted into a national bank. *Id.*
 3. Where the owners of more than two-thirds of the stock of a bank consent to the conversion of the bank into a national bank, such a conversion may take place without the concurrence of the remaining stockholders. *Id.*
 4. While it might be more regular, on the conversion of a bank into a national bank, for a new stock book to be opened and new certificates to be issued in the name of the national bank, yet as there is nothing in the law prescribing the form of the stock book, or of the certificates of stock, there is nothing to prevent the new bank from treating the old books and certificates as sufficient evidence of title in the concern; neither the rights nor liabilities of the stockholders could be affected by the mere omission to issue a new form of stock certificate to them. To hold otherwise would be to allow all the stockholders to escape liability by the mere omission of the formality of issuing the shares in a new form. *Id.*
 5. Where a stockholder of the old bank has given his consent that the stock should be converted into stock of the national bank, he becomes by virtue of that consent a stockholder in the new bank, notwithstanding any omission to issue new certificates of stock. *Id.*
 6. The powers of the directors of a national bank are not regulated by the strict principles of a special trust. They act in a fiduciary capacity, but are clothed by the statute with a power to manage the affairs of the bank, and this implies a considerable element of discretion. *Keyser v. Hitz et al.*, 513.
 7. It is not an improper exercise of that discretion, where cash is needed for the legitimate business of the bank, to accept anticipated payment of a debt bearing a high rate of interest where such debt constitutes an unavailable asset. *Id.*
 8. Where a bank, under a contract made by its officers, receives money for the purpose of being applied by it to certain uses, such money cannot be retained by the bank except in accordance with the contract under which it was received, although its officers exceed their powers in making the contract. The money comes into its hands charged with a trust and the retention of it constitutes an acceptance of the trust, and at the same time a ratification of the acts of its officers. *Id.*

BILLS AND NOTES. See *Gaming Contracts*, 2; *Evidence*, 2; *Laches*, 1; *Specialties*, 1.

1. Although during the pendency of a suit brought upon a promissory note endorsed in blank the plaintiff transfer it by delivery, he may still maintain the action if it be agreed between him and the transferee that notwithstanding the delivery the legal title shall be considered as still remaining in the plaintiff for the purpose of prosecuting the suit. *Keyser v Shepherd*, 66.
2. The holder of a promissory note endorsed in blank transferred it by delivery pending a suit brought by him upon it, his attorney filing an order in the cause for the entry of the suit to the use of the transferee, which was done. On the trial the defendant contended that plaintiff had parted with his title and could not maintain the action.
Held, That the order of the attorney was to be presumed as authorized by plaintiff, and that this order was equivalent to an agreement that the suit should be prosecuted for the benefit of the assignee of the note, the legal title to remain in the nominal plaintiff as far as necessary for that purpose, and that under such circumstances the suit could be maintained. *Id*.
3. *Scoble*, If M. accept an order of B. & C. in favor of H., payable out of whatever will be due B. & C. on the completion of their contract, and afterwards advances to B. & C. money that was due *only on such completion*, he will be liable to H. for as much as was thus paid away to the latter's prejudice. *Hammond v. Miller*, 145.
4. Where by a resolution of a stock company a promissory note is issued to pay an indebtedness of the company, the note being signed by the treasurer and endorsed by the directors as such, and afterwards the paper is taken up by one of them, this is nothing more than an advancement by him in behalf of his co-obligors, and entitles him to a contribution for the money thus advanced; he cannot pick out one of the endorsers and charge him with the whole liability, as in the case of an ordinary endorsement. *Middleton v. McCartee*, 420.

BILLS OF EXCEPTION. See *Practice*, 7.

1. The 65th Rule of Court requires bills of exceptions to be settled before the close of the term, which may be prolonged for that purpose. A bill of exceptions was brought to the court in General Term, dated twenty-seven days after the close of the term at which the case was tried, while no prolongation of the term was shown to have been ordered. On the other hand, the entry in the minutes of the court stated that the bill of exceptions taken in the case had been signed and sealed on the last day of the term.
Held, That the court, having the ends of justice in view, would, in such a conflict of dates, give weight to the statement of the

BILLS ON EXCEPTIONS (*continued.*)

minutes and treat the bill as having been signed during the term. *Johnson v. Douglass*, 36.

2. A general exception to the granting of prayers is irregular. The party objecting should except specially to the granting of each prayer. *Moore v. Railroad Co.*, 437.
3. So, too, with the charge; the unobjectionable parts should be segregated from that which is objectionable, and the latter excepted to specially. *Id.*

BILL OF REVIEW.

Where on appeal the court in General Term remands a case to the Special Term, a bill to review the decree entered in obedience thereto cannot be entertained by the Special Term. But where the decree of the General Term extends to part only of the decree appealed from, the Special Term may entertain a bill to review so much of its own decree as was not affected by the decree of the appellate court. *Williams v. Gardner*, 93.

BUILDING ASSOCIATIONS.

1. Where, by the constitution of a building association, it is provided that "the association shall continue until the unsold stock is worth fifty per cent. premium, and shall then proceed to close," if the value of the association's real estate and other assets aggregate the fifty per cent. of profit contemplated by this clause of the constitution, then the association cannot make the stockholders keep on paying dues while it holds its real estate for some further advance, but it must close up. *Burns v. Building Association*, 7.
2. Where the real estate held by the association consists of property bought in by it at public auction in competition with other bidders, the price bid by the association must be taken, as against it, as conclusive of the value of the property for the purpose of ascertaining if the time has arrived when the association should close; but the value, if greater, may be shown by witnesses, for the association cannot, with an all-sufficient amount of property in its hands to enable it to close up, go on collecting dues. *Id.*

BUILDING CONTRACTS. See *Contracts*, 3-6.

BURDEN OF PROOF. See *Principal and Surety*, 3; *Husband and Wife*, 1.

CHATTEL MORTGAGES. See *Landlord and Tenant*, 2.

CHECKS. See *Bank Checks*.

CHOSES IN ACTION.

Stock of an incorporated company is a *chose in action*. *Keyser v. Hütz*, 473.

COMMISSIONER OF PATENTS. See *Patents*.

CONGRESS OF THE UNITED STATES.

1. In pursuance of conventions between Mexico and the United States, for the adjustment of certain claims, concluded July 4, 1868, and April 29, 1876, a commission was established which awarded a sum of money to W. Subsequently, June 18, 1878, Congress, by its act of that date, directed the Secretary of State to receive from Mexico, and distribute to the various claimants, the amounts awarded them, except that in the case of W., the President of the United States was requested by the 5th section of the act to investigate any charges of fraud presented by Mexico as to said case, "and if he shall be of opinion that the honor of the United States, the principles of public law, or consideration of justice and equity" require that said case should be opened and retried, it shall be lawful for him to withhold payment of said award. &c. An investigation of the charges was accordingly made, and a decision in favor of W. arrived at, whereupon certain instalments of the award were paid to him. This was during the term of President Hayes. Afterwards, and during the term of his successor, the question arose whether the power conferred by Congress to investigate, &c., was exhausted by President Hayes' exercise of it, or, on the contrary, was a continuing or recurring power which might be exercised by any succeeding President, who, if he should be of a different opinion from his predecessor, would be authorized to withhold payment of the instalments yet undistributed.
Held, That the request was obviously addressed to the existing President, and when he made the investigation and announced the result, this request was satisfied. That it could not be considered a continuous and reiterated request to each succeeding President to re-examine the subject, and consequently the power to withhold the payment of the award which was to result from that examination must be deemed equally limited. *United States, ex rel. Key, v. Frelinghuysen, 299.*
2. Where money due citizens of the United States has been paid, under a treaty, by a foreign government to the United States, but there is no provision as to the manner in which the money is to be distributed among the claimants, and Congress subsequently enacts a law to that end, it is within the power of Congress to repeal such law, and to provide a different mode of distribution, or even to leave the claimants just as they were before the passage of the act; and this it may do either by directly repealing such law or by the ratification of a treaty inconsistent therewith.
Id.
3. When Congress is in session, and a law or treaty calculated to repeal an existing law is pending before it, this court, it seems, might, under such circumstances, await the final action of that body upon such law or treaty, before granting or refusing a writ

CONGRESS OF THE UNITED STATES (*continued.*)

of mandamus prayed for against one of the co-ordinate branches of the government to compel it to carry into effect the existing law. But it will be otherwise when such law or treaty has been pending during two sessions and Congress has adjourned without acting upon it. *Id.*

CONSIDERATION. See *Contracts*, 1, 2; *Principal and Surety*, 2-8.

The legal part of an undertaking can be enforced if the consideration for it is entirely legal, but an undertaking is void if any part of its consideration is illegal. Thus, if a man receive a legal consideration for a promise to do a thing, part of which is legal and the other illegal, he will be compelled to carry out that part of his agreement which is legal; but if such a promise is not given for money or other value received, but in consideration of another executory promise, such as a promise to forbear, the latter is vitiated by reason of the partial illegality of the executory promise given as its consideration, and the agreement to forbear is, therefore, not binding. *Green v. Lake*, 162.

CONTINUANCE. See *Motions*, 1.CONTRACTS. See *Banks*, 3; *Bills and Notes*; *Evidence*, 1-8; *Gaming Contracts*; *Pleading*, 1; *Principal and Agent*, 1; *Principal and Surety*; *Statute of Frauds*.

1. Delivery is not necessary to a transfer of title to personalty; if the vendor and vendee agree that the title is in the vendee, at once and without any further act, it changes hands by that agreement, although no delivery is made. *Johnson v. Douglass*, 37.
2. The fact that the vendor consents to the execution by the vendee of a deed of trust upon the goods, is one of the strongest proofs of an intention to pass the title to the property, although no actual delivery of it had been made. *Id.*
3. Where one partly performs his contract and then refuses to complete it, he has no right of action upon the contract even for the work already done; his rights under it are gone when he abandons it, and the other party has a right to treat it at once as at an end. *Hammond v. Miller*, 145.
- Quare*, Whether the acceptance of the work partially performed, even when the acceptance cannot be avoided, does not raise an implied assumpsit to pay the reasonable value of the work so accepted. *Id.*
4. But in the case of an uncompleted contract to build a house, when the work already done has been paid for, the owner has the right, immediately upon the default, to take possession of the unfinished building and finish it himself, or employ others to do so, and under no such circumstances can the original contractor have a claim upon the owner of the land for any saving effected on the original contract price in the completion of the building. *Id.*
5. Under a building contract, *M.*, the owner, had full power, in case

CONTRACTS (*continued.*)

of the default of the contractors, B. & C., to finish the houses at their cost, and to deduct the same from any money owing them at the time of default. B. & C. defaulted, having been paid for all work done to date. The completion of the houses was then undertaken by M., and effected at a less cost than the original contract price. It was argued that the completion was, under the terms of the contract, a completion by M. as agent of B. & C., and on their account, and hence B. & C. were entitled to the saving made on the contract price.

Held, That it was optional with M. to complete the contract on B. & C.'s account, or to treat it as wholly rescinded, and finish the houses for his own benefit; that having elected the latter, the saving was his own, and not B. & C.'s. But, *quære*, if money sufficient to finish the work and belonging to B. & C. had been in M.'s hands, would the work finished by M. be work done with the money of B. & C., and, in contemplation of law, *their* work, so as to entitle them to any saving on the contract price made by M.? *Id.*

6. The defendant contracted with the District to lay a wooden pavement, and agreed, on being notified, to repair any part of it which at any time during three years from the completion of the work should become defective from improper material or construction, and, in case of failure so to do, he agreed that the same might be done at his cost by the District. The pavement proved a failure and the defendant having been notified to repair failed to do so. Whereupon, the District authorities tore up the pavement and put down an asphalt one and thereafter brought this action upon the contract to recover the cost. There was no evidence offered at the trial showing directly the cause of the failure of the pavement, nor was it shown that repairs were made necessary by reason of any defect arising from improper material or construction. It was argued, however, that as some of the blocks had been shown to be sound when the pavement was torn up, that was a fact from which the jury might infer that the failure of the others was from imperfect material or construction.

Held, 1st. That such an inference might perhaps be proper had it been shown that the blocks which remained sound were placed in like position and subjected to the same exposure and wear and tear as the blocks that failed, but not otherwise. 2d. That a contract to repair a pavement "if at any time during the period of three years any part of it should become defective from improper material or construction" is not an unconditional guarantee that the pavement shall last three years in any event. 3d. Nor will such an interpretation gather any force from the fact that in another portion of the contract there is a clause providing "that all loss or damage arising out of the nature of the work to be done

CONTRACTS (*continued.*)

under this agreement, or from any unforeseen obstructions, or difficulties which may be encountered in the prosecution of the same, or from any action of the elements, or from incumbrances to individuals, property, or otherwise, on the line of the work, or adjacent thereto, shall be sustained by the said contractor." Such a clause is well known in building contracts and relates only to losses or damages which may happen during the progress of the work. 4th. That the District could not substitute a new pavement of an entirely different character and recover the cost thereof from the defendant. 5th. That the contract being to repair "if any part of the pavement should become defective from improper material or construction," no liability arises on the part of the defendant unless the repairs are shown to have been necessary because of defects arising from "improper material or construction." *District of Columbia v. Clephane*, 155.

7. In the absence of an express contract, the law does not imply a promise from a father to a son to pay for services rendered when the son is living with the father free of all cost for board and lodging. *Cohen v. Cohen's Executor*, 227.
8. If the failure of one of the parties to a contract be but partial, leaving a distinct part as a subsisting and executed consideration, and leaving also to the other party his action for damages for the part not performed, the latter cannot treat the contract as rescinded unless both are returned to the condition in which they were before the contract was made. *Magarity v. Shipman*, 334.
9. S., having contracted to build certain dykes, formed a partnership with M., who agreed with S. to do a portion of the work, M. partially performed his portion and then discontinued, whereupon S. entered into a new and different contract with M. in regard to the completion of the same work.

Held, that this new contract was a substitute for and settlement of all that had preceded it and that S. could not thereafter recover for any loss or damage occasioned by M.'s failure to carry out his first contract. *Id.*

10. Where M., for a share of the profits, agrees to furnish S. with the means to enable him to perform certain work and partially fails, the remedy is at law and the measure of damages is the increased cost to which S. has been subjected by such failure. *Id.*
11. If, on the other hand, M. was justified in ceasing to furnish the means because of some breach of the contract on the part of S., while he may not claim a share of the profits, *qua profits*, he may have his action for damages. *Id.*

In all the instances above given, the remedy is at law and not in equity. *Id.*

12. Where, as part of an arrangement by which a loan is to be secured on real estate, a conveyance of the premises is made, that arrange-

CONTRACTS (*continued.*)

ment will, of itself, supply the consideration for the conveyance.
Keyser v. Hitz, et al., 513.

CONSTRUCTION OF STATUTES.

1. In the construction of statutes in *pari materia*, they are all to be kept alike in view, and construed in the light of each other, and their effect considered under such construction. *U. S., ex rel., Koehlin v. Martle*, 12.

CONTRIBUTION. See *Bills and Notes*, 4.

1. Where a decree is made against several defendants for the payment of a sum of money, a payment of the amount by either of them works a satisfaction of the decree, because all the defendants are principals and the duty to pay the whole sum devolves upon each of them. Therefore, after a decree is thus satisfied, an execution can no longer issue under it against the other defendants for the purpose of enforcing contribution from them. *Herr v. Barber*, 545.
2. Contribution, at law, cannot be enforced by one *tort-feasor* against his co-wrong-doers, where the transaction out of which the judgment arises involves moral turpitude. So, if the controversy, upon which a decree is rendered, were a breach of trust on the part of all the defendants, the defendants would stand in the position of joint *tort-feasors*, and one of them, after having paid the amount of the decree, could not have an execution upon it against his co-defendants, for the purpose of enforcing contribution from them. *Id.*

CONTRIBUTORY NEGLIGENCE. See *Street Cars*, 1.

1. If a parent sues for the loss of services of a child by reason of injuries resulting from the defendant's negligence, contributory negligence on the part of the parent is a complete defence; but it is otherwise if the child sues by the parent or any other next friend. *Moore v. Railroad Company*, 437.
2. What would be contributory negligence in an adult, may not be such in the case of a child of tender years; the caution required is according to the maturity and capacity of the child, and this is to be determined by the circumstances of the case. *Id.*
3. The question whether the capacity of a child is such that he can be charged with contributory negligence is one of fact which must be determined by the jury. *Id.*
4. Though the evidence of negligence may be slight, and though it may have affected the court differently from the way in which it affected the jury, the court may not feel at liberty to say that there was not sufficient to go to the jury. *Id.*

CORPORATIONS. See *Bills and Notes*, 4; *Choses in Action*; *Estoppel*; *Municipalities*.**DAMAGES.** See *Municipalities*, 1, 2; *Nuisance*, 1-3; *Sewers*; *Statute of Limitations*, 1.

DECLARATIONS. See *Malicious Prosecution*, 2.

1. The relationship of a deceased party cannot be established by his own declarations, but must be proved *aliunde*; when, however, that relationship is once established, his declarations as to kinship of other parties are admissible. *Anderson v. Smith*, 275.
2. An exception to this rule is allowed only in cases of very ancient pedigree, where it is impossible to find proof of the declarant's relationship otherwise than by his own declarations, but even in that case some degree of evidence is required. *Id.*
3. A party has a right to designate his own heirs; whether he be mistaken as to the relationship or not concerns no one but himself; declarations of a deceased party upon that subject are therefore properly admissible. *Id.*

DECREES. See *Contribution*; *Res Judicata*.

Where, after a decree is rendered against joint *tort-feasors*, one of the defendants conveys his land and, subsequently, another of the defendants satisfies the decree by payment, the land so conveyed is discharged from the liability which attached to it while the decree remained unsatisfied. *Herr v. Barber*, 545.

DEED OF TRUST. See *Contract*, 2; *Ejectment*, 1; *Mortgage*.**DEEDS.** See *Attachment*, 3; *Ejectment*, 1; *Married Women*, 3; *Statute of Frauds*, 4-6.**DELIVERY.** See *Contract*, 1; *Vendor and Vendee*, 1.**DEMURRER.** See *Pleading*, 1.**DETINUE, ACTION OF.** See *Judgments*, 2, 3.**DEVISES.** See *Joint Tenancy*, 1, 2; *Life Estate*, 1.**DISCRETION OF COURT.** See *Practice*, 8.**DISTRICT OF COLUMBIA.** See *Municipalities*, 1, 2; *Sewers*, 1.**DIVORCE.**

1. Sections 876 and 877 of the Revised Statutes of the District of Columbia, regulating the competency of parties to actions, suits, &c., as witnesses, does not apply to suits for divorce *a vinculo*. *Burdette v. Burdette*. 469.
2. But in a suit for a divorce from bed and board, on the ground of cruelty, the petitioner may, under the 98th Equity rule of this court, be examined as a witness as to any cruel or inhuman treatment, alleged in the petition to have taken place where no witness was present competent to testify. In all other cases the parties are incompetent. *Id.*

EASEMENTS. See *Sewers*, 2.**EJECTMENT.** See *Declarations*, 1-3.

1. In ejectment when the plaintiff derives his title through a sale made by a trustee, by reason of default under a deed of trust

EJECTMENT (*continued.*)

given to secure the payment of a sum of money, it is not necessary that the plaintiff shall affirmatively establish by parol evidence all the preliminaries showing the authority of the trustee to sell, such as the default, the regular advertisement of the sale of the property, &c. If, after the debt is due, according to the terms of the deed of trust, the trustee conveys in professed execution of the trust and by way of foreclosure, he passes the legal title to the grantee for all the purposes of an ejectment suit. If he has acted in violation of his trust, the remedy against him is in equity. *O'Day v. Vansant*, 273.

2. In ejectment in this District the general rule is that in making proof of record title the plaintiff must go back to the original source and show a grant, either from the State of Maryland or the United States; and then, if there should be a hiatus in the chain of title, twenty years' possession in conformity with the deeds will raise a presumption of the missing links. But when both parties claim title from the same sources it is not necessary to go beyond that source. *Anderson v. Smith*, 275.
3. When the plaintiff has failed to trace title from the State of Maryland or the United States, and the defendant, instead of resting upon that defect, goes on with his evidence and in the course of it shows that he is claiming from the same source as the plaintiff, the defect in the plaintiff's proof will be cured. *Anderson v. Smith*, 275.
4. In an action of ejectment plaintiff should show that the defendant was in possession. *Anderson v. Smith*, 275.

ENDORSEMENT. See *Bills and Notes*, 2, 4; *Gaming Contracts*, 2.

EQUITY PLEADING.

1. It is sufficient in a bill brought to have a conveyance set aside on the ground that it was made with intent to defraud creditors that the complainant state a *prima facie* case, to be afterwards established by proof; mere matters of evidence on the general question of fraudulent intent need not be made the subject of special averment. *Edwards v. Entwisle*, 43.
2. Where a demurrer is to the whole bill, and is good only as to a part, it must fail altogether unless the court grant leave to amend, which it may do. *Williams v. Gardner*, 93.

ESTOPPEL. See *Principal and Surety*, 6; *Separate Estate of Married Women*, 11.

Where a shareholder of a corporation is called upon to respond to a liability as such, he is not permitted to deny the existence of such corporation. *Keyser v. Hütz*, 473.

EVIDENCE. See *Auditor*, 2; *Building Associations*, 2; *Contracts*, 2; *Contributory Negligence*, 3, 4; *Declarations*, 1-3; *Divorce; Ejectment*, 1-4; *Equity Pleading*, 1; *Husband and Wife*, 1; *Malicious*

EVIDENCE (continued.)

Prosecution, 1-3; *Marriage*, 1, 2; *Pledgor and Pledgee*, 1; *Practice*, 1, 3, 6, 8, 9, 11; *Set-off*, 1, 2; *Street Cars*, 2; *Verdict*, 1; *Voluntary Conveyance*, 1, 3; *Fraudulent Conveyance*, 1, 2-10.

1. A verbal contract cannot be received in evidence to alter a written one. *Melville v. Railroad Co.*, 68.
2. A note payable *ten* days after date cannot be introduced in evidence to support an action on a note described as payable *three* days after date. *Johnston v. Randall*, 81.
3. The admission of evidence as to injuries suffered, without regard to the period covered by the statute, is error, but will be cured by an instruction afterwards given the jury that the plaintiff cannot recover for such injuries as were inflicted prior to three years before the bringing of suit, *provided* the evidence given is such that the jury can divide the injuries inflicted within the three years from that which was incurred prior thereto; but it will be otherwise when the evidence is not of such a character. *Herring v. The District*, 87.
4. In an action to recover damages for a private nuisance on the premises of the defendant, it is error to admit in evidence an official letter addressed by a municipal officer to the defendant notifying him of the existence of a public nuisance upon his property and directing him to abate it. Such a letter, if regarded as an official proceeding, is *res inter alios*; if treated as a declaration of the fact, it is mere hearsay. It is also objectionable because it refers only to the existence of a *public* nuisance, and could not therefore establish the fact of a private nuisance. *Moore v. Langdon*, 127.
5. Where it appears in the bill of exceptions that, notwithstanding an exception taken to the admission of certain testimony given by one of the defendant's witnesses, the same testimony was afterwards given by the defendant himself, without objection on the part of the plaintiff, the ruling of the court in admitting the testimony in the first instance will be no ground for a new trial. *Coleman v. Heurich*, 189.
6. Where the issue on trial is the value of the services of a son as clerk in his father's store, evidence of the amount of salary paid by the father to another son in the same store is irrelevant and inadmissible. *Cohen v. Cohen's Executors*, 227.
7. Where the plaintiff has taken the witness stand in his own behalf in a suit against an executor to recover the value of services rendered the testator, it is error and a good ground for a new trial if the court admit his testimony against the objection of the defendant as to statements made by the deceased relating to a matter in controversy. *Id.*
8. In an action on a written contract, where an alteration, though fraudulent, is alleged to have been made by one of the parties,

EVIDENCE (*continued.*)

testimony that the same party made similar alterations in similar contracts made about the same time with other parties, is inadmissible to prove the alteration of the contract sued upon. *Cotharin v. Davis*, 230.

9. Declarations of the vendor or assignor made subsequently to the transfer of property by him are not admissible in evidence for the purpose of impeaching such transfer. *Tierney v. Corbett*, 264.
10. Even though the evidence for the plaintiff was insufficient to make out a *prima facie* case, this court will not sustain an exception to the refusal of the court below to so instruct the jury, if it appear that the defects of the plaintiff's case were afterwards supplied by the evidence offered by the defendant. *Moore v. Railroad Co.*, 437.
11. The evidence act is intended simply to relieve the particular disabilities enumerated—that the party called is interested or is a party; but the disabilities arising from want of age, or mental infirmity, or infamy, &c., or that the witness is called to testify for or against her husband (except in particular cases) remain, notwithstanding the witness may be a party to the suit, or may be interested in the result. *Clark v. Krause*, 559.

EXECUTION. See *Contribution*.**EXECUTORS AND ADMINISTRATORS.** See *Evidence*, 6, 7; *Statute of Limitations*, 4, 5; *Vendor and Vendee*, 2.

1. Letters of administration granted by the Orphan's Court of this District upon the local assets of a deceased non-resident entitle the administrator to receive and receipt for moneys due his intestate in the Treasury of the United States, at Washington. *United States, ex rel., Halstead v. Wyman*, 368.
2. Whenever such payment is a mere ministerial function, not involving the exercise of official discretion, and the officers of the treasury refuse to pay the administrator, a mandamus will lie from this court to compel such payment. *Id.*
3. Such moneys constitute personal assets of the deceased within this District. *Id.*
4. Since the repeal of the act of June 24, 1812, by omission from the Revised Statutes, foreign administrators can neither sue nor be sued as such in the District of Columbia. *Id.*
5. When an administrator founds a claim upon a contract made by himself, although it relates to the estate he represents, he may sue upon the contract in his own name. Whether he may also sue on such a contract in his representative character, *quære*. *Campbell v. Wilson*, 497.
6. By an express contract, money was received by W., an attorney, for C., the latter being an administrator appointed in Florida. The attorney alleged an assignment of the fund and refused to pay

EXECUTORS AND ADMINISTRATORS (*continued.*)

it over. More than three years afterwards C. took out letters here and described himself as administrator under the laws of this District, and brought an action against W. for money had and received.

- *Held*, That although the money was not payable to C, as administrator here, his description of himself as such might be rejected as surplusage, and, but for the Statute of Limitations, a recovery allowed in his individual name. *Id.*

FORBEARANCE, CONTRACTS OF. See *Consideration of Contracts ; Principal and Surety*, 1-7.

FOREIGN PATENTS. See *Patents*, 4.

FRAUD. See *Fraudulent Conveyance, Voluntary Conveyance.*

Where a defendant is brought into court to meet a charge of fraud, and effectually repels it, the complainant cannot change his ground, and obtain other relief, based upon the proof of constructive fraud, or other equities supposed to be established by the evidence. *Clark v. Krause*, 559.

FRAUDS, STATUTE OF. See *Statute of Frauds.*

FRAUDULENT CONVEYANCE. See *Equity Pleading*, 1; *Fraud ; Partnership*, 1; *Voluntary Conveyance.*

1. The near relationship existing between the grantor and grantee, in a case of an alleged fraudulent conveyance, may, under certain circumstances, be considered as a make-weight of importance when taken in connection with other established suspicious facts ; but, standing alone, it amounts to nothing as evidence of fraud. *Clark v. Krause*, 559.
2. Before a sale will be set aside for inadequacy of price alone, it must appear that the price was so grossly inadequate as to shock the moral sense, and create at once upon its being mentioned a suspicion of fraud. *Id.*
3. A debtor in failing circumstances may prefer one creditor to another if the preference is *bona fide*. *Id.*
4. Where a conveyance of real estate is attacked as fraudulent, possession of the property after the execution of the deed, is not without weight in determining the question of fraud, and in a doubtful case it may strengthen any just suspicion arising from other causes. But it does not *per se* raise a presumption of fraud as it does in the case of personal estate, where possession is *prima facie* evidence of ownership. *Id.*
5. A delay of three weeks between the execution and recording of a deed is not so unusual or suspicious a circumstance as to amount to evidence of fraud, especially where there is nothing to show that any new debts were incurred during the interval. *Id.*

FRAUDULENT CONVEYANCE (*continued.*)

6. A deed which names the purchase price and acknowledges the payment thereof, is itself an efficient and compendious receipt for the purchase money; therefore, where payments had been made and receipted for in various instalments prior to the execution of such a deed, the loss or destruction of these antecedent receipts is no evidence of fraud, especially where the parties appear to be persons unfamiliar with matters of business. *Id.*
7. Where the complainant calls the defendants (the alleged fraudulent grantor and grantee) as witnesses, he thereby vouches for their competency and credibility, and is estopped to assail their statements for the lack of either of these qualities, though he is of course at liberty to call others who may show that the defendants are mistaken in their statements. *Ib.*
8. *Quære*, Whether the examination of a defendant by a plaintiff does not operate as an equitable release to him so far as regards the matter as to which he is interrogated and therefore prevent any decree against him except as to matters wholly distinct from those as to which he was examined. *Id.*
9. When the charge of fraud is unsupported by the testimony of a single witness for the plaintiff, unfavorable inferences are not to be drawn from the failure of the defendant, who gives his testimony as plaintiff's witness, to explain circumstances of alleged suspicion supposed to be inconsistent with his positive statements. *Id.*
10. Application to the court to compel an answer is the proper course where a witness is recusant, and the failure to make such application may well be taken as an abandonment of the demand for the witness' testimony. *Id.*

GAMING CONTRACTS.

1. Where a contract is made for the delivery or acceptance of securities at a future day, at a price named, and neither party at the time of making the contract intends to deliver or accept them, but merely to pay differences, according to the rise or fall of the market, the contract is a gaming one, and is void as contrary to public policy. *Justh v. Holliday*, 346.
2. The endorser of a promissory note given on account of such dealings as are recognized as gaming transactions, can rely upon their illegality as a defence to an action on the note. *Id.*
3. In an action to recover money, where the defence set up is that the contract was a stock gambling one, the real question for determination is the *bona fides* of the transaction. It is not the *form*, but the *intent*, with which the scheme was planned. If neither party contemplated that there should be a delivery of the stock, but merely to pay differences according to the rise or fall of the market, the contract is a gambling one. *Id.*

GENERAL TERM. See *Practice*, 11.

HUSBAND AND WIFE. See *Married Women*; *Partnership*, 1; *Voluntary Conveyance*. 3.

1. The burden of proof is upon the wife, when she claims that expenditures made in the purchase and improvement of property are from her separate estate. *Edwards v. Entwisle*, 43.
2. In the District of Columbia the labor of the wife and the earnings resulting therefrom are the legal property of the husband. *Id.*

INSTRUCTIONS TO THE JURY. See *Bills of Exception*, 2, 3.

1. It is not error to refuse certain prayers presenting propositions of law already set forth in other prayers, and subsequently enforced by the charge of the court. *Coleman v. Heurich*, 189.
2. The practice of multiplying instructions unnecessarily and of announcing to the jury abstract propositions of law in the words of the definitions from text books, whereby the jury are misled and embarrassed, commented on and condemned. *Id.*
3. Casual words in the midst of a long charge, where it is apparent that they could not have been understood by the jury as nullifying all the foregoing instructions in the prayers and charge, will not be a ground for new trial. *Id.*

INSURANCE.

1. R., at the time of his death, was a member in good standing of an association in the nature of a life insurance company whose object was, as declared by the charter and by-laws, "to provide and maintain a fund for the benefit of the widow, orphan, heir, assignee or legatee of a deceased member." By a provision of one of the by-laws if a deceased member had no *legal representatives* the money they would have been entitled to was to become the property of the association. Another by-law provided that "no change of beneficiary can be made or recognized until submitted to and approved by the board of directors." R. had joined the society in the lifetime of his first wife, and named her as the beneficiary, she dying, he married again, and died intestate, without having notified the association of any change of beneficiary. Whereupon three separate claims were made to the fund. First, by the representatives of the first wife; second, by the representatives of the husband; third, by the surviving widow.

Held, 1. That the language used by the husband in designating his first wife as the beneficiary must be interpreted as meaning only in case she survived him, and as she did not, her representatives were not entitled. 2. That the term "legal representatives" in the clause providing "that where the deceased member has no *legal representatives* the money shall become the property of the association," is to be taken as meaning those who are legal representatives in the contemplation of the charter and by-laws, to wit, the people there enumerated, "the widow, orphans, heir or legatee,"

INSURANCE (*continued.*)

&c. 3. That in the absence of any direction by the deceased, the order in which the parties to be benefited are named in the charter and by-laws is the order in which they are entitled to the fund, viz., the widow; if no widow, then the orphan; if none, then the heir, &c.; and therefore the widow was entitled to the fund in this case. *Relief Association v. McAuley*, 70.

INTEREST. See *Usury*.

JOINT TENANCY.

1. A mere devise to two, as to "William, Joseph and John A. Butler," without more, would create a life estate in joint tenancy. *Buller v. Buller*, 96.
2. But whether such a devise after a previous devise of the same property for life is to be considered a life estate merely, or an estate in fee, or a joint tenancy, or a tenancy in common, is to be controlled by the intention of the testator as gathered from other parts of the will. *Id.*

JUDGMENT CREDITOR. See *Contribution*; *Statute of Frauds*, 4.

JUDGMENTS. See *Statute of Frauds*, 4, 5.

1. The Circuit Court has power, on motion, where proper cause is shown, to vacate its judgment and grant a new trial after the expiration of the term at which the judgment was rendered.

So held, in this case where the court on motion and cause shown vacates a judgment nearly four years after its rendition. *Phillips v. Negley*, 236.

2. Form of judgment for plaintiff in an action of detinue. *Tierney v. Corbett*, 264.

3. A judgment in detinue if improperly entered, may be reformed by the General Term so as to be according to the precedents, without sending the case back for a new trial. *Id.*

4. Plaintiff recovered in the Circuit Court of this District a judgment in an action of tort. On appeal to the Supreme Court of the United States, the judgment was affirmed with costs and interest, until paid, "at the same rate per annum that similar judgments bear in the District of Columbia."

Held, That these words are not to be taken as directing an inquiry into the character of the action in which the judgment below was rendered, but merely as indicating that the rate *per centum* at which the interest must be computed, shall be no higher or lower than the legal rate in the jurisdiction where the judgment was originally recovered. *Baptist Church v. Railroad Company*, 458.

5. And it *seems*, per Hagner J., that a judgment founded on tort, recovered in the courts of this District, bears interest from its rendition to its satisfaction. *Id.*

JUSTICE OF THE PEACE. See *Landlord and Tenant Proceeding*, 1, 2.

• LACHES.

B., an officer of the army, having a claim against the United States for pay and allowances, gave T. & Co. a power of attorney to collect the same. The power of attorney did not authorize T. & Co. to endorse any check that might be issued in settlement thereof. On the 16th of January, 1866, L., United States Paymaster, issued his check in payment of the claim on the defendant bank, which was one of the designated depositaries of the United States, in the city of Washington. The check was drawn payable to the order of B., and was mailed by L. to T. & Co. One of the firm forged an endorsement on the check in B.'s name, and had it cashed by R. & Co.; R. & Co. then sent it to the Bank of A., in the city of New York, who presented it to the defendant bank, when it was thereupon paid. B., not receiving the money or hearing from his claim, collected it from another paymaster. Three years afterwards (January 15, 1869), the forgery of the endorsement was discovered, whereupon L., within six days afterwards, notified the defendant bank, and advised it to seek recourse against the Bank of A., and within nine days more furnished it with such proofs of the forgery as were possessed by the Government. In February, 1875, the United States brought suit against the defendant bank to recover the money paid on the check. The defences were, that L., and not the United States, should have brought the suit; and laches, in failure to give timely notice, whereby the defendant had lost its recourse against the prior endorsers.

Held, 1st. That the suit was properly brought by the United States. 2nd. That the payment of a forged check gives no right of action *on the paper itself*, against any party to it; as in the case of a bill or note or check which had been dishonored, the party paying can only sue the party paid for money had and received, leaving it to the latter to sue in the same manner his immediate predecessor in the transaction; and, as the defendant bank had not been deprived of its recourse against the only party it could have sued, viz., the Bank of A., there being still three years left, under the statute of limitations of New York, after it received notice of the forgery, in which it could have brought suit, no such laches had been shown on the part of the United States as would disentitle it to recover. *United States v. Bank*, 289.

LANDLORD AND TENANT. See *Attachment*, 1, 2; *Landlord and Tenant Proceeding*; *Receivers*.

1. Secs. 677-679, R. S. D. C., give the landlord a lien for his rent upon *the goods of the tenant*, and not upon the goods of other persons which are upon the demised premises. *Johnson v. Douglass*, 37.
2. Where the tenant's goods are encumbered by a chattel trust prior to being placed upon the demised premises, the landlord's lien

LANDLORD AND TENANT (*continued.*)

fastens upon the goods subject to the trustee's paramount right of property and possession. *Id.*

3. A tenant may contract with his landlord to quit on shorter notice than thirty days, notwithstanding the provisions of the Landlord and Tenant's Act of the Revised Statutes of the District of Columbia. *Waggaman v. Bartlett*, 450.

LANDLORD AND TENANT PROCEEDING.

1. An appeal lies to the General Term from an order of the Circuit Court striking out a plea of title in a landlord and tenant case, and remanding the same to the justice of the peace for trial on the merits. *Waggaman v. Randall*, 160.
2. When a defective plea of title is stricken out by the Circuit Court, and the cause remanded to the justice of the peace, the defendant may there file a new or amended plea of title. *Id.*

LETTERS PATENT. See *Patents*.

LIEN. See *Decrees; Landlord and Tenant*, 1, 2.

LIFE ESTATES.

A general devise over after the creation of a life estate in the same property will pass the fee. *French v. Campbell*, 321.

LIMITATIONS, STATUTE OF. See *Statute of Limitations*.

MALICIOUS PROSECUTION.

1. In an action for malicious prosecution, evidence that the defendant, in suing out a warrant, acted under the advice of a magistrate, police officer or other layman, is not admissible. *Coleman v. Heurich*, 189.
2. Nor will the declarations of the defendant, *post litem motam*, be admissible in his defence. *Id.*
3. The plaintiff, for the purpose of showing the want of probable cause may show that, prior to his arrest, he was a man of good character and reputation in the community in which he resided, and that the defendant knew this. *Id.*
4. In an action for malicious prosecution, the defendant may testify as to his motive, and that he was not actuated by any malice or ill will in instituting or carrying on the prosecution. *Id.*
5. Where a party selects from the evidence bearing upon the question of probable cause, an isolated circumstance, and requests the court to express to the jury an opinion as to its probative force separated from any other fact proved in the case, a refusal to do so is not error. *Id.*
6. Nor is it error to refuse to instruct the jury that in consequence of the defendant's failure "to assail the character and reputation," of the plaintiff, the presumption of the latter's good character and reputation, "become absolute in the case." *Id.*

MALICIOUS PROSECUTION (*continued.*)

7. While it is the province of the jury to find whether the fact alleged in support of the presence or absence of probable cause, and the inferences to be drawn therefrom really exist, it is for the court to determine whether, upon the fact so found, there be probable cause or the want of it. *Id.*
8. In an action for malicious prosecution, a verdict for the defendant will not be set aside, although the justice trying the cause has erroneously charged the jury, if it appear from the record, that (conceding the evidence to be true) the plaintiff has failed to make out a case of want of probable cause. *Id.*
9. Facts reviewed, which the court considers repel the charge of want of probable cause. *Id.*

MANDAMUS. See *Congress of the United States*, 4; *Executors and administrators*, 2; *Patents*, 1-3.

1. By the 18th Rule of this court all petitions for mandamus are required to be presented to a judge in Special Term or in Chambers when the case can be afterwards certified to the General Term. *U. S., ex rel. Warden, v. Chandler*, 527.
2. In applications for mandamus the rule to show cause why the writ should issue is not grantable as of course; the court in the exercise of its discretion will refuse the preliminary order where the petition itself shows that further proceedings would be a waste of time and would ultimately prove futile; especially will this be the case where the grounds upon which the respondent refuses to act in the manner required by the petitioner are set forth in the petition, and appear to the court sufficient to justify his refusal. *Id.*
3. Before this court will award a mandamus against an executive officer the petition must disclose: 1. That the party applying has a clear legal right to the relief he claims, and that he cannot obtain it by any other proceeding; 2. That there exists a clear legal duty on the part of the official against whom the right is asked, which he refuses to perform; 3. That the duty which is thus claimed and imposed is one ministerial in its character and in no degree discretionary. *Id.*
4. The attorney and counsel of the party in interest cannot act as the relator in an application for mandamus; the action must be brought in the name of the owner of the thing claimed, who alone can be recognized as the claimant. *Id.*
5. A party who has only a partial interest in the amount claimed has no authority, to the exclusion of all other claimants similarly circumstanced, to use the name of the United States in an application to the court to dispose of the whole amount. *Id.*
6. The question whether an executive officer of the Government shall revise the action of his predecessor is one addressed to his discretion, and cannot be interfered with by this court by mandamus. *Id.*

MARRIAGE.

1. Proof that plaintiff's parents, who were slaves, lived together in Virginia as man and wife, without proof of a marriage, either according to law or according to any custom prevailing at the time in any State, cannot be received as evidence of the legitimacy of their offspring. *Anderson v. Smith*. 275.
2. The provisions of section 724 Revised Statutes of the District of Columbia, in relation to the co-habitation of colored persons previous to their emancipation, applies only to those who were residents of the District of Columbia. *Id.*

MARRIED WOMEN. See *Husband and Wife*; *Separate Estate of Married Women*.

1. Though a married woman come into possession of real estate after the passage of the Married Woman's Act of 1869, if her title be derived through a will which took effect prior to the passage of the act, her rights in the property are not affected by the act, but are to be determined by the common law. *White v. Hilton*, 339.
2. The husband has a freehold in such of the wife's freehold property as she acquired prior to the act of 1869, and although her title be a joint tenancy, he is entitled, in right of his marriage, and during the coverture, to the possession and the rents and profits. *Id.*
3. Where such a title is held by the husband, it is equivalent to a freehold, and ejectment by the wife and her joint tenants to recover the possession cannot be sustained unless the husband be joined in the action. *Id.*
4. Where the question is one of personal capacity to sue, as coverture, it should be pleaded in abatement, but where the question is one of title, as that the title claimed by one of the female plaintiffs in ejectment is in her husband (who is not a party to the action) and not in herself, this may be shown under the general issue. *Id.*
5. Under the Married Woman's Act of 1869, R. S. D. C., the right of a married woman to hold bank stock, acquired by her during marriage, otherwise than by gift or conveyance from her husband, is as absolute as if she were unmarried; she can convey, devise and bequeath it in the same manner and with like effect as if she were unmarried, and may contract, sue and be sued in her own name in all matters having relation to it; she is also amenable to all the consequences of its ownership, and of its conversion into national bank stock, including the individual responsibility of stockholders, in the same manner as if she were a *feme sole*. *Keyser v. Hitz*, 473.
6. Where the wife acquires property by gift or conveyance from her husband, she holds it, as she would at common law, with a qualified property in her husband, being liable to assign it without his consent; and she is unable, if it is a *chose in action*, to have it reduced to his possession. *Id.*
7. Where a married woman holding savings bank stock derived by

MARRIED WOMEN (*continued.*)

gift or conveyance from her husband agrees with his consent to convert the stock into national bank stock, she thereby regularly and legally acquires title to the latter stock; and although she still holds the new stock subject to the marital rights of her husband, she is nevertheless subject to the individual responsibility of national bank stockholders, and may be assessed for all losses and be compelled to pay out of her other estate to the amount of the par value of her stock. *Id.*

8. It seems, however, that it might be otherwise if the transfer of the stock to her and its subsequent conversion were made without her knowledge or consent. *Id.*
9. The liability incurred by a holder of national bank stock, to be assessed to the amount of the par value of the stock for all losses of the bank, is a statutory liability, and not a contract one. It is a liability imposed by the statute as an incident of the ownership of the stock, and attaching to all who are capable of that ownership, without reference to any supposed voluntary assumption of the liability by express or implied contract. Therefore, where national bank stock is held by a *feme covert*, either in her own right or subject to the common law marital rights of her husband, the liability to be assessed affects her alone, and a suit to enforce the collection of the assessment is properly brought against her without joining her husband, as would be necessary in the enforcement of any common law obligation or liability of the wife. *Id.*

MONEY HAD AND RECEIVED.

An action for money had and received cannot be sustained unless it be shown that when the money was received it was *ex æquo et bono* the money of the plaintiff claiming it, and that it was received at the time for his use. *Campbell v. Wilson*, 497.

MORTGAGES. See *Use and Occupation*, 1.

MUNICIPALITIES.

1. A municipal corporation is not liable for the consequences of a mere error of judgment in the plan or design of its public works; negligence in the choice of its agents or instrumentalities must be shown. *Bannagan v. The District*, 285.
2. If a sewer when first constructed be of adequate capacity, but subsequently becomes obstructed, whereby damage ensues, no responsibility therefor attaches to the municipal authority except after notice and neglect to redress the evil. *Id.*

NATIONAL BANKS. See *Banks*.

NEW TRIAL. See *Practice; Appeals*.

NEXT FRIEND. See *Contributory Negligence*, 1.

NOTES AND BILLS. See *Bills and Notes*.

NUISANCE. See *Evidence*, 4.

1. That which is a public nuisance affords no ground of action unless it is also a private nuisance. *Moore v. Langdon*, 127.
2. A person is liable only for that damage which is the direct and proximate result of his acts. Therefore, where a sewer is not of *itself* a nuisance, the owner or builder is not liable because a nuisance is created by an improper use of it by others, and over which he has no control. *Id.*
3. *Semble*, It might be otherwise if in granting an easement in the sewer he had warranted to the grantee the right to make such improper use of it, or having retained control over, had knowingly permitted such use. *Id.*

OPINION OF COURT. See *Res Judicata*, 2.

ORPHANS' COURT. See *Executors and Administrators*, 1; *Practice*, 5, 10.

PARENT AND CHILD. See *Contracts*. 7; *Contributory Negligence*, 1.

PAROLE AGREEMENTS. See *Statute of Frauds*.

PARTIES TO ACTIONS. See *Married Women*, 3-4.

PARTNERSHIP.

Where a partner uses the funds of the partnership to purchase property and settle it upon his wife, creditors of the partnership may pursue the property in equity. *Edwards v. Entwisle*, 43.

PATENTS.

1. Whether, in an application for a mandamus to compel the issuance of letters-patent for an invention, the Secretary of the Interior and not the Commissioner of Patents, should be made the part, respondent, *quære*. *U. S., ex rel. Koechlin, v. Marble*, 12.
2. Congress, in creating the Patent Office, has by express legislation given that office the power to enact rules for its conduct; those rules, if within the powers of the Office and reasonable, are just as authoritative as the laws of Congress itself. *Id.*
3. There is nothing unreasonable in the requirements of Rule 39 of the Patent Office, and, where it has not been complied with, this court will not issue a mandamus to compel the issue of a patent, although the invention be new and useful. *Id.*
4. An inventor receiving a patent in the first-instance in this country is entitled to seventeen years' protection of his invention, but if he has previously obtained letters-patent in one or more foreign countries, then, while not deprived of his right to a patent here, the term to which the law in such case limits his protection is a period not extending beyond the date of the expiration of that one of the foreign patents first expiring. *Id.*

PLEADING. See *Equity Pleading*; *Landlord and Tenant Proceeding*, 2; *Married Women*, 4; *Res Judicata*, 1-3.

A demurrer to a declaration in an action for breach of contract will be sustained when the contract declared upon is a contract between the plaintiff and a third party, and there is no averment showing the relation of the defendant to that party, nor to the contract. *Melville v. Railroad Co.*, 63.

PLEA OF TITLE. See *Landlord and Tenant Proceedings*, 1, 2.

PLEDGOR AND PLEDGEE.

1. An action for goods bargained and sold is not sustained by proof that the goods were pledged, and that the pledgee sold them and appropriated the money to his own use. *Stiles v. Sellinger*, 429.
2. The proper remedy is an action of trover to recover the goods or their value; or assumpsit for money had and received, but in the latter case the pledgor would be entitled only to the amount received for the goods by the pledgee, less the amount advanced with interest thereon. *Id.*
3. The rights and liabilities of pledgor and pledgee in a case of alleged forfeiture of the pledge incidentally considered. *Id.*

PRACTICE. See *Bills of Exceptions*, 1; *Bills and Notes*, 2; *Instructions to the Jury*; *Judgments*; *Married Women*, 4; *Motions*, 1.

1. It is error for the court to allow any papers which have not been put in evidence to be taken by the jury to their room. *Brien v. Beck*, 82.
2. But if the paper has been put in evidence, it is in the discretion of this court whether to permit it to go to the jury room. *Id.*
3. The decision of the justice trying the cause, as to whether a paper is in evidence or not forms no ground of exception. *Id.*
4. Where, without consent of counsel, the court could have given permission to the jury before their retirement to take a paper out with them, the fact that permission was given without such consent *after* their retirement is not material. *Id.*
5. An appeal lies to the General Term from the rulings of the court in special term during the trial of issues from the Orphans' Court, involving the execution of a will and the competency of the testator. Affirming *Coughlin v. Poulson*, 2 Mac A., 208. *Stewart v. Elliott*, 357.
6. Where an appeal is taken from the action of the court below overruling a motion for a new trial, on the ground of the insufficiency of the evidence, or because the damages are excessive, the statute (Secs. 805-6 R. S. D. C.) requires the settling of "a case" containing all the testimony, and such a case is presented when the record contains the certificate of the trial justice that it embodies all the evidence produced on both sides at the trial. Affirming the decision upon this point in *Dant v. District of Columbia*, 3 Mac A., 273. *Id.*

PRACTICE (*continued*).

7. The exceptions to the rulings of the court need not be made the subject of separate bills, but may be embodied in the "case" certified by the trial justice. *Id.*
8. The rule of the common law that the granting or refusal of a motion for a new trial is a matter resting in the discretion of the justice trying the case and cannot be the ground of a writ of error on appeal, has been affected by the Revised Statutes of the District only so far as to give the right of appeal in three cases, viz., where the motion has been urged upon *exceptions*, or for *insufficient evidence* or for *excessive damages*. The General Term has, therefore, no power to interfere with a verdict on the ground that it was contrary to the evidence, or against the weight of the evidence, or because it is inconsistent or uncertain. *Id.*
9. It is the legal sufficiency of the evidence which the statute refers to when giving an appeal upon the ground of "insufficient evidence," and evidence is legally sufficient when it is of such a character and volume that it may well satisfy a reasonable mind of the truth of the position it is introduced to maintain, in which case it must be submitted to the jury who are exclusive judges of its sufficiency *in fact*, and their finding cannot be interfered with by the General Term. *Id.*
10. An appeal from the action of a justice of this court holding a special term for Orphans' Court business, is to be taken in the same manner as an appeal from the action of a justice holding any other special term of the court. *Keyser v. Briedbarth*, 332.
11. It is not the province of the court in General Term, on a bill of exceptions to the ruling of the court below, to decide as to the weight of the evidence, and its sufficiency in fact, but to determine whether the record discloses sufficient evidence in law to justify the granting of the prayer refused. *Justh v. Holliday*, 346.

PRECEDENTS.

Precedents and principles should not be departed from in order to meet what may be thought to be the abstract justice of a particular case. *Herr v. Barber*, 545.

PRESIDENT OF UNITED STATES. See *Congress of United States*, 1, 3.

PRESUMPTIONS. See *Contract*, 7.

PRINCIPAL AND AGENT.

A general authority to a real estate agent to sell real property, is only an authority to find a purchaser but not to conclude and execute a contract binding upon his principal. *Ryon v. McGee*, 17.

PRINCIPAL AND SURETY.

1. Where parties sign an instrument under seal jointly or jointly and severally, they sign it as principal debtors, and parol evidence will not be received to show that one of them signed as surety only and that an extension having been given the principal, the surety was thereby discharged. But whether it would be otherwise if the alleged surety is prepared to show that he has been actually injured by the extension, *quære*. *Green v. Lake*, 162.
2. A contract between a creditor and a principal debtor for forbearance for a limited time, is a discharge of the surety only when the agreement to forbear is binding on the creditor, if, therefore, the agreement is without consideration, or otherwise not binding, the forbearance is no defence. *Id.*
3. The burden of proof is on the surety to show that an agreement to forbear is a valid and binding one upon the creditor. *Id.*
4. If the creditor simply agrees to extend the time indefinitely on payment of the legal interest, that is no more than he would be entitled to receive without any agreement, and as he receives no new consideration, such a promise is not binding, but it is otherwise if, in consideration of the extension, the interest were paid in advance, for the creditor in such case gets something more than he would be entitled to receive as a matter of course. *Id.*
5. An agreement to forbear in consideration of an executory promise to pay usurious interest in the future, is void under the statutes of usury, nor does it make any difference that at the expiration of the period of forbearance the usury was actually paid by the debtor. *Id.*
6. Where the surety sets up the defence that the creditor had extended the time of the principal, the creditor is not estopped, by the fact that he has received the consideration for which the extension was made, to reply that the consideration was an illegal one. *Id.*
7. The court will presume, in the absence of evidence to the contrary, that the usurious interest was agreed to be paid at the expiration of the period of forbearance. *Id.*

PROBABLE CAUSE. See *Malicious Prosecution*.

PROMISSORY NOTES. See *Bills and Notes*.

RECEIVERS.

Pending cross-appeals from a decree settling equities between a market company and certain of its tenants, lessees of stalls, receivers were appointed to collect the rents. There was no provision in the decree appointing the receivers, authorizing them to enforce payment of the rents, nor directing them to take possession and lease the stall to another in case any tenant should abandon it or otherwise violate the terms of his lease. The tenants failed to prosecute their appeal, and one of them, after failing for some time to

RECEIVERS (*continued.*)

pay the receivers any rent, abandoned his stall. Whereupon the market company took possession and leased it to another.

Held, That the authority of the receivers extended only to receiving the rents from these particular tenants as they chose to pay, and that on non-payment of the rent, or other violation by the tenant of the terms of his lease, the landlord was entitled to re-enter.
Market Co. v. Warthen Bros., 432.

RECORDING OF DEEDS. See *Attachments*, 4.

RECOUPMENT. See *Set-off*, 2.

REFERENCES TO AUDITOR. See *Auditor*.

RENT. See *Attachment*, 1, 2; *Landlord and Tenant*, 1, 2; *Receivers*; *Separate Estate of Married Women*, 12; *Use and Occupation*.

REPAIR, CONTRACTS TO. See *Contracts*, 6.

REPEAL OF LAWS. See *Congress of the United States*, 2.

RES JUDICATA.

1. Where a decree in equity is relied upon as *res judicata*, and is pleaded in bar in a subsequent suit, it must be shown that the decree was made upon the same subject-matter and for the same purpose, and that the parties, in the character in which they are litigants, are identical. *Strong v. Grant*.
2. For the purpose of ascertaining the point in controversy in a former suit, and what the court really intended to settle by its decree, not only the record, but, if necessary, the *opinion*, as reported in the officially published report of the case, will be examined. *Id.*
3. The matter settled by a decree in a former suit, stated by the court and distinguished from that of the case at bar, and held not to be an adjudication of the present controversy. *Id.*

REVISED STATUTES OF THE DISTRICT OF COLUMBIA.

The following, among others, referred to, commented on or explained :

Section 553. See *Banks*, 1.

677-679. See *Landlord and Tenant*, 1.

684. See *Landlord and Tenant*, 3.

716. See *Usury*, 1, 2.

722. See *Appealable Orders*.

724. See *Marriage*, 2.

727-8. See *Separate Estate of Married Women*.

805-6. See *Practice*, 6.

876-7. See *Divorce*, 1, 2.

REVISED STATUTES OF THE UNITED STATES.

The following, among others, commented on, referred to or explained.

Section 856. See *Evidence*; 7.

5153-4. See *Banks*.

SAVINGS BANKS. See *Banks*.

SEALS. See *Specialties*.

SECURITY FOR COSTS. See *Motions*, 1.

SECRETARY OF INTERIOR. See *Patents*, 1.

SET-OFF. See *Usury*, 1-3.

1. A set-off must be a substantial demand by a real party interested in the payment of that which is the subject of the action; whether the party appears upon the record or not is immaterial, if it be shown that he is the real party interested; and the court will go outside of the record to find the real party. *Oil Company v. Barber*, 4.
2. The same rule applies in cases of recoupment; thus, in an action by A against B and C, the defendants sought to recoup the plaintiff's demand, it was shown that D, who was not a party to the record, was a partner of B and C in the original contract, and was interested in the reduction of the plaintiff's demand, and that he had suffered in common with B and C the damage sought to be recouped.
Held, That the recoupment was admissible. *Id.*
3. Money cannot be set off against the plaintiff's demand which the defendant could not recover from him in an independent suit. *Kendall v. Vanderlip*, 105.

SEPARATE ESTATE OF MARRIED WOMEN. See *Married Women*, 1.

1. A married woman may acquire title to property either by gift or by sale, and when the title is not derived from her husband, it becomes her separate property under the Married Woman's Act, and she is competent to make contracts concerning it. *Johnson v. Douglass*, 37.
2. The effect of sections 727 and 728 of the Revised Statutes relating to the District, is to render a married woman competent to act in her character of proprietor of her separate estate, just as any other proprietor may act. Not only may she give away, sell, lease or lend her separate property, but she may charge it with any kind of lien, and she may do so by the same acts or contracts which would operate in the case of any other proprietor. *Solomon v. Garland*, 113.
3. In addition to the absolute contract power given her by these two sections, in cases where her separate property was the subject-matter of the contract, Congress went further and gave her in the next section a like power in certain other defined cases where the subject-matter of the contract was not her separate property, but something "having relation" to it, although it was a matter in which, previous to the contract, she had no interest or right. *Id.*
4. The question whether the alleged contract is about a matter having

SEPARATE ESTATE OF MARRIED WOMEN (*continued.*)

the required relation to her separate property, is a question of law. *Id.*

5. That is not, within the meaning of the statute, a matter having relation to her separate property, when there is a *total absence* of all right to claim, as her property, that to which the subject-matter of the contract is alleged to have relation. *Id.*
6. But this ruling is not to be taken as meaning that, in ascertaining the existence of a separate property to which the matter of contract must have relation, the question whether her title is a good and valid one will be tried. *Id.*
7. The furnishing of a house belonging separately to a married woman is a matter having relation to her separate property within the meaning of the statute. *Id.*
8. An executory agreement by a married woman to purchase a house is binding upon neither party. She will not, therefore, by virtue of such agreement, be the owner of a separate estate in relation to which she may make a contract. *Id.*
9. Whether a married woman who takes a lease of a house, and thereby acquires a term, may contract for the furnishing thereof, as a matter having relation to her property in the term, *quære.* *Id.*
10. A married woman being in the occupation of a house and premises, it was contended that, as she could not be dispossessed by the owner without thirty days' notice, she was, therefore, the owner of a term in the premises to that extent; that such a term was her separate property, and that the purchase of furniture to furnish this house was a matter having relation to her right to possess it for this term.

Held, That the thirty days' notice is a limitation upon the landlord's remedy, and that the occupation meanwhile being on suffrance has not the quality of a term; it is not assignable, and has none of the traits of property, and therefore cannot be treated as the separate property of a married woman. *Id.*

11. The statute gives to a married woman power to make certain contracts when she actually has separate property, but she is not given that power by merely pretending to have such property. The question is one of legal capacity, and a fraudulent pretense that the capacity exists cannot create it. The doctrine of estoppel has, therefore, no application to a case of that kind. *Id.*
12. A married woman made a purchase of furniture. The contract had no relation to her separate estate, but she promised to pay for the goods out of the rents derived from a house which was her separate property.

Held, That at law this was a mere promise to pay money, and that a married woman's promise to pay for that which does not relate to her separate property cannot be enforced. Whether such a promise would operate as a charge upon her rents and could be enforced in equity, *quære.* *Id.*

SETTLEMENT OF SUITS. See *Attorneys*.

SEWERS. See *Municipalities*, 1; *Nuisance*, 1-3.

1. Damages resulting to private property from the d
tion of a sewer by the District affords no ground
it is shown that the District was guilty of care
the selection of the engineer or in the selection
ring v. The District, 87.
2. Where one owning a piece of ground lays it off int
and, after sewerage the streets, sells the lots, ea
with an easement in these sewers, he thereby pa
of control over the sewers, although he still ret
ownership of the soil of the streets. *Moore v. L*

SLAVES. See *Marriage*, 1, 2.

SPECIALTIES.

In the District of Columbia a printed seal at the en
is sufficient to make the instrument a specialty;
162.

STATUTE OF FRAUDS.

1. A parol agreement by A with B to purchase and l
for the benefit of B is, it *seems*, within the statu
if, after the purchase, A refuses to comply with
agreement, equity will not enforce it. *Ragan v.*
2. But when such a transaction does not turn upon
ment, but upon conduct which deceives the o
misleads him, and which it would be fraudul
statute of frauds does not apply to such a case,
is one of fact. Thus where C. agrees verbally
property is about being foreclosed for default in
debt secured upon it by deed of trust, that he w
and purchase the property, and will afterward
being reimbursed, the purchase price, and accor
sale and announces to the bystanders that he
property for R., and thus discourages the biddi
gard such conduct as operating to charge him a
especially when he purchases the property for
And in such case proof of the antecedent agre
missible as going to show one of the elements
device of the defendant in announcing himsel
purchaser for the benefit of the debtor. *Id.*
3. A case resting upon such facts stated, wherein the
purchase a resulting trust, and directs an account
profits. *Id.*
4. A deed of bargain and sale of real estate, not re
months from its date, and containing no trust c
face, is void against creditors whose judgment

STATUTE OF FRAUDS (*continued.*)

prior to its record, although subsequent to the date of the deeds
Nelson v. Henry, 269.

5. While it is true that a judgment creditor does not levy upon any other or better title than that which the debtor has, and that he takes it subject to all outstanding equities, yet the Statute of Frauds has made it necessary that any trust attaching to property in the hands of an ostensible owner shall be expressed in writing.
Id.
6. The rule established by the Statute of Frauds and the registry laws is, that the creditor is entitled to pursue the ostensible title even though it may not be the real title of the debtor. *Id.*

STATUTE OF LIMITATIONS. See *Evidence*, 3.

1. Where, in action to recover damages for injuries to property the Statute of Limitations is pleaded, recovery can only be had for such injuries as were incurred during the period not covered by the Statute. *Herring v. The District*, 87.
2. As long as a fund is held professedly and admittedly as a trust, no lapse of time precludes the beneficiary from claiming it. But the moment there is some breach of duty or adverse claim by the trustee, the Statute commences to run. *Campbell v. Wilson*, 496.
3. It is doubtful whether the law of trusts, as a bar to the Statute, applies to the case of money collected by an attorney for his client, since such moneys are not intended to be held in trust, but are to be paid over promptly. *Id.*
4. When one is barred by the Statute of Limitations from suing on a contract in his own name, he cannot remove the bar by taking out letters of administration and suing in his representative character. *Id.*
5. As a general rule, when the Statute of Limitations begins to run, no subsequent transfer of title to the cause of action arrests its operation, thus if it has commenced to run against a party in his lifetime, it continues to run against his administrator; if it has commenced to run against an administrator, it will continue to run against the administrator *de bonis non*, &c. *Id.*

STATUTES, CONSTRUCTION OF. See *Construction of Statutes*.

STATUTES OF MARYLAND.

The following, among others, referred to, commented or explained :

Act of 1729, ch. 8, sec. 5. See *Vendor and Vendee*.

1763, ch. 23, sec. 8. See *Assignment*.

1785, ch. 80. See *Auditor*.

STATUTES OF UNITED STATES.

The following, among others, referred to, commented on or explained :

Act of June 24, 1812. See *Executors and Administrators*, 4.

May 5, 1870. See *Banks*.

June 17, 1870. See *Banks*,

STATUTES OF THE UNITED STATES (*continued.*)

June 30, 1877. See *Banks*, 1.

April 29, 1878. See *Attachment*, 3.

STOCK COMPANIES. See *Bills and Notes*, 4.

STOCK GAMBLING. See *Gaming Contracts*.

STREET CARS. See *Contributory Negligence*.

1. Where there is abundant standing room inside of a street car, in which there are pendent straps which a passenger may hold while standing, he is guilty of contributory negligence who rides upon the platform, and if an injury result to him, which would not have occurred had he been in the inside of the car, he cannot maintain an action for such injury. *Andrews v. Railroad Company*, 137.
2. In an action to recover damages for injuries sustained while riding on the platform of a street car, the court will presume, in the absence of evidence to the contrary, that the car was a good one. *Id.*
3. The respective obligations of street railway companies, and of persons, (including children) crossing the railway tracks declared in the instructions given to the jury by the court below and approved by this court. *Moore v. Railroad Company*, 437.

TERMS OF COURT. See *Judgments*.

TESTAMENTARY CAPACITY. See *Wills*, 2, 3; *Practice*, 5.

TORT-FEASORS. See *Contribution*, 2; *Decrees*.

TREATIES. See *Congress of the United States*, 1-4.

The President has no power to make treaties except by and with the advice and consent of the Senate, and with the concurrence of two-thirds of its members present. A treaty, therefore, which has not been thus ratified, is wholly inoperative to affect antecedent laws or the rights acquired under them. *Id.*

TRIALS. See *Motions*, 1.

TROVER. See *Pledgor and Pledgee*, 1, 2.

TRUSTS AND TRUSTEES. See *Ejectment*, 1; *Statute of Frauds*, 3, 5; *Statute of Limitations*, 2, 3.

UNDUE INFLUENCE. See *Wills*, 3.

UNITED STATES. See *Laches*.

USE AND OCCUPATION.

In a account between mortgagor and mortgagee, where the latter has been in possession and is chargeable with a reasonable sum for use and occupation, that charge is to be determined, not by the value of the premises, but by the value of the use under all the circumstance. Therefore, where the use is valueless, no charge will be made against the mortgagee.

USE AND OCCUPATION (*continued.*)

So held, in this case, where the Supreme Court of the United States directed a charge against the defendant of a reasonable sum for use and occupation by him of the premises in controversy, and this court finds the use of no value. *Peugh v. Davis*, 23.

USURY. See *Principal and Surety*, 2-7.

1. Under Section 716 of the Revised Statutes of this District, it is the party only who pays the illegal interest, who is given the right to recover, and not some other party; therefore, where certain promissory notes made by V. for the accommodation of T. were deposited with K. as collateral security for money loaned by K. to T. at usurious rates, V. cannot, when sued by K. upon the notes, set off against K.'s demand, the amount of the usurious interest paid by T. *Kendall v. Vanderlip*, 105.
2. Whether under Section 716, R. S. D. C., the party paying the usurious interest may set off the amount so paid in an action against him by the party receiving it, *quære*. *Id.*
3. It is not competent for the court, where parties have paid money expressly as usury, to make a different application of it, and apply it as a payment on account of the debt and legal interest. *Id.*

VACATION OF JUDGMENT. See *Judgment*.VENDOR AND VENDEE. See *Attachment*, 3; *Contract*, 1, 2; *Evidence*, 9.

1. Where the vendor took the property to the presence of the vendee, told her it was hers, gave her a bill of sale, and took a dollar apparently to bind the bargain, and the vendee thereupon asked the vendor to retain and take care of the property for her, this is a delivery constructively and symbolically, if not actually. *Tierney v. Corbett*, 264.
2. Under the Maryland act of 1729, ch. 8, sec. 5, in force in this District, an executor or administrator, as such, cannot assail any transfer of property which would be good against the deceased were he living; any rights which they may have as creditors to impeach the transaction must be pursued by them in that capacity. *Id.*

VERDICT. See *Practice*, 8.

A verdict will be set aside when evidence calculated to exercise a decided influence upon the minds of the jury has been improperly admitted. *Moore v. Langdon*, 127.

VOLUNTARY CONVEYANCE.

1. Evidence of intent to defraud existing creditors by a voluntary conveyance of property by one largely indebted is *prima facie* evidence of fraud against subsequent creditors, but not conclusive; it may be rebutted by showing that the existing debts were

VOLUNTARY CONVEYANCE (*continued.*)

secured by mortgage, or were provided for in the settlement itself, or that they have since been fully paid off. But when those debts are paid off by creating new debts, as by borrowing money, or by purchasing goods on credit and out of the proceeds, which ought to be applied to pay the purchase price, discharging the antecedent debt, or in any way which only relieves an indebtedness in one direction by increasing it in another, the case is to be treated as if the prior indebtedness had continued throughout. *Edwards v. Entwisle*, 43.

2. Where a voluntary conveyance is void as against creditors, those acquisitions of the donee which are the mere fruit and outgrowth of the property conveyed, share the same fate. *Id.*
3. Where, in the case of a voluntary conveyance, it is shown that the donor had continued all the time to pay the taxes and repairs and interest on encumbrances, and had raised money on the property, for his own use, by deed of trust, and had also applied the largest part of the proceeds of a sale of a part of it to his own use, these, or such facts, will be conclusive evidence to a court of equity that the conveyance was a mere cloak to protect the property from creditors; and where the donee is the wife the force of the evidence is a question of degree only; her allowance of such a control and beneficial use by her husband of property previously settled upon her by him, is at the risk of having it declared responsible for his debts. *Id.*

WILLS. See *Practice*, 5.

1. Where the context of a will gives to language employed in one clause a particular meaning, the court will give the same meaning to the same language employed in another clause. *Buller v. Buller*, 96.
2. The degree of mental capacity, which must be possessed by the testator in order to make his will valid, is no more nor less than that which is requisite in the case of a deed or contract. *Id.*
3. Undue influence and importunity sufficient to invalidate a will may be exercised without the existence of fraud. *Stewart v. Elliott*, 307.

WITNESS, COMPETENCY OF. See *Divorce*, 1, 2.

Ex. G. a. a.

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